Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

NORTH CAROLINA PAYPHONE ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In this case arising from the Telecommunications Act of 1996, the D.C. Circuit held both that the FCC did have jurisdiction under 47 U.S.C. § 276 to regulate the intrastate rates charged by Bell Operating Companies to independent payphone service providers ("PSP") for connection to the local exchange network and that the FCC did not have jurisdiction under § 276 to regulate the intrastate rates charged by non-BOC local exchange companies to PSPs for connection to the local exchange network. This decision denies the benefits of the otherwise comprehensive regulatory scheme in § 276 to one-third of all independent PSP phones in the nation.

The question presented is whether, in light of this Court's jurisdictional analysis in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), a Congressional amendment of the Communications Act that explicitly gives the FCC jurisdiction to adopt regulations concerning intrastate matters must also explicitly direct the FCC to adopt regulations concerning specific carriers in order to overcome the jurisdictional hurdle imposed by § 2(b) of the Communications Act.

Parties to the Proceeding

In addition to the parties named in the caption, the following parties participated in the proceeding below: New England Public Communications Council, Inc.; Verizon Telephone Companies; BellSouth Telecommunications, Inc.; Qwest Corporation; and SBC Communications, Inc. The following additional parties intervened in the proceeding below: American Public Communications Council, Inc.; Wisconsin Pay Telephone Association, Inc.; and TDS Telecommunications Corporation.

Corporate Disclosure Statement

Petitioner North Carolina Payphone Association ("NCPA") is a North Carolina trade association representing more than 30 providers of pay telephone equipment, service, and facilities at the state and national levels for the purpose of promoting the general commercial, professional, legislative, regulatory, and legal interests of its membership. NCPA is a non-profit corporation incorporated in the State of North Carolina.

NCPA has no parent companies and no nonwholly owned subsidiaries for which disclosure is required by Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner North Carolina Payphone Association ("NCPA") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is published at 334 F.3d 69 (D.C. Cir. 2003) (App. 1a-19a). The underlying order of the Federal Communications Commission is published at 17 FCC Rcd 2051 (2002) (App. 20a-60a). The order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing and rehearing en banc is unpublished (App. 61a-62a).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is sought was entered on July 11, 2003. Rehearing and rehearing en banc were denied on September 22, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

The relevant federal statutes at issue in this case are 47 U.S.C. § 152, 47 U.S.C. § 201, 47 U.S.C. § 202, 47 U.S.C. § 205, and 47 U.S.C. § 276. The pertinent text of these statutes is set forth in the appendix (App. 63a-69a).

Statement of the Case

NCPA brings this Petition on behalf of the independent payphone service provider ("PSP") industry (i.e., payphones not owned by the incumbent local exchange telephone companies) operating payphones nationwide in the territories

of local exchange telephone companies who are not former Bell Operating Companies ("non-BOC LECs"). The opinion below affirms both the FCC's determination that it did have jurisdiction under § 276 of the Communications Act of 1934 (the "Act"), 47 U.S.C. § 276 (App. 67a), to regulate the intrastate rates charged by BOCs to PSPs for connection to the local exchange network and the FCC's decision that it did not have jurisdiction under § 276 to regulate the intrastate rates charged by non-BOC LECs to PSPs for connection to the local exchange network. *See New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 78 (D.C. Cir. 2003) ("*NEPCC*") (App. 16a-17a). This decision effectively denies the benefits of the otherwise comprehensive regulatory scheme in § 276 to one-third of all independent PSP phones in the nation and may deny refunds to PSPs of tens of millions of dollars of overcharges by non-BOC LECs that have accrued since April 1997.

As to this latter determination, the FCC made clear in the order that was under review in the D.C. Circuit, *see In the Matter of Wisconsin Public Service Commission Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), that its decision was based on its own assessment of its jurisdiction under § 276 as a matter of law rather than on the exercise of discretion afforded it under that statute. Indeed, the FCC conceded that "the federal regulatory program implemented in [§ 276] would surely benefit" if its rules extended to *all* LECs, *Wisconsin Order* at ¶ 42 (App. 46a), and the FCC initially concluded in a notice-and-comment rulemaking proceeding that it did have such jurisdiction, *see Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11

FCC Rcd 21233 (1996), at ¶¶ 162-163.[1]

NCPA seeks a writ of certiorari to review the opinion below insofar as it affirms the *Wisconsin Order*'s conclusion that the FCC lacked jurisdiction as a matter of law under § 276 to reach the intrastate rates of non-BOC LECs.

1. This case turns on the interpretation of § 2(b) of the Communications Act, 47 U.S.C. § 152(b) (App. 63a), which restricts the FCC's authority to reach intrastate rates. Section 2(b) is one of the most critical provisions of the Act because it deals with the permissible scope of FCC regulations and it comes into play in nearly all of the FCC's decisions concerning telecommunications because nearly all telecommunications have at least some intrastate and some interstate components. In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), this Court concluded that the Telecommunications Act of 1996 (the "1996 Act") (of which § 276 is a part) substantially lessened the formerly "hog tight, horse high, and bull strong" § 2(b) "fence," *AT&T*, 525 U.S. at 375 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997)), because of the plain intention in the 1996 Act to affect intrastate rates. Despite this Court's consideration of the continued relevance of § 2(b) to the 1996 Act, the D.C. Circuit ignored that key aspect of *AT&T* as it applies to this case.

The opinion below instead concluded that, although § 276 clearly applies to intrastate rates of BOCs, § 276 lacks

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[1] It is clear under these circumstances that the FCC's original determination that it possessed jurisdiction to reach the payphone access line and usage rates of non-BOC LECs is entitled to considerably more deference than its *volte-face* in the *Wisconsin Order*. *See, e.g., INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001); *see also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *cf. Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). Although NCPA raised this argument below, there is no indication in the opinion of the degree of deference that the D.C. Circuit afforded the agency.

specificity as to the intrastate rates of non-BOC LECs. In so holding, the opinion erroneously conflates the *jurisdictional* question presented under § 2(b) with the *statutory interpretation* question presented generally under § 276 and the FCC's other enabling statutes. The opinion engrafts, *sui generis*, an additional requirement on the *AT&T* Court's § 2(b) analysis—i.e., that Congress must clearly evince an intent *not only* to reach intrastate rates *but also* to reach the intrastate rates of a particular carrier—a requirement, to counsel's knowledge, never before expressed by any other court, and a requirement that is inconsistent with the plain language of § 2(b) itself. By requiring a clear and specific Congressional expression of intent not only as to intrastate matters but also on the subject of the proposed regulation, the opinion's "intrastate plus" approach effectively nullifies the agency's well-established authority to fill in regulatory gaps where the agency otherwise has authority to act. Moreover, this interpretation will create a conundrum for the FCC in other cases concerning the application of § 2(b) as well as in other cases where the agency is purporting to act pursuant to *Chevron* step two deference, forcing the agency to choose between the D.C. Circuit's "intrastate plus" approach and this Court's "intrastate-only" approach in *AT&T*.

2. In the 1996 Act, Congress fundamentally transformed the regulatory environment in which telecommunications services are provided, erecting a "pro-competitive, de-regulatory national policy framework." S. CONF. REP. NO. 104-230, at 1 (1996). To that end, Congress substantially altered the traditional roles of the federal and state governments in regulating telephone service, reallocating authority from the states to the federal government. *See, e.g.*, *AT&T*, 525 U.S. at 378 n.6 (stating that there can be no question "whether the Federal Government has taken the regulation of local telecommunications competition away from the States . . . [because] it unquestionably has").

As part of this new framework, Congress sought to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b). Under state regulation, competition in the payphone industry had suffered. Competitive entry was restricted; local coin rates were kept artificially low; LECs' payphone operations received subsidies from other regulated LEC services; and independent PSPs were dependent on their principal payphone competitors, the LECs, for access to the public switched network.[2] In § 276, consequently, Congress directed the FCC to "terminat[e] the current system of regulation" and "[i]n place of the existing regulatory structure . . . establish a new system." H.R. REP. NO. 104-204, at 88 (1996). Specifically, § 276(b) required the FCC to

> (1) "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone" and
>
> (2) "discontinue . . . all intrastate and interstate payphone subsidies . . . in favor of [this new] compensation plan."

47 U.S.C. § 276(b)(1)(A), (b)(1)(B) (respectively). To make clear the FCC's preeminent authority over formerly state-regulated payphone services, Congress provided that the regulations adopted by the FCC "shall preempt" any inconsistent state

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[2] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* (hereinafter, "*Payphone Rulemaking*"), First Report and Order, 11 FCC Rcd 20541, ¶¶ 13-16 (1996) ("*First Payphone Order*"), *modified on recon.*, 11 FCC Rcd 21233 (1996) ("*Reconsideration Order*") (collectively, the "*Payphone Orders*").

requirements. *Id.*, § 276(c).

Among the major, real-world impediments to the achievement of this comprehensive restructuring was the fact that "[i]ndependent PSPs currently rely on *LECs* for basic payphone services." *First Payphone Order*, ¶ 14 (emphasis added). The FCC noted that "*LEC* participation both in providing payphones to the public and also providing the underlying tariffed payphone services to independent PSPs may give *LECs* the incentive and the potential ability to unfairly act to the detriment of their PSP competitors and to act in other anti-competitive ways against PSPs." *Id.* (emphases added). Thus, "*incumbent LECs* may have an incentive to charge their competitors unreasonably high prices for [basic payphone] services." *Id.*, ¶ 146 (emphasis added). Given this incentive, the FCC concluded that, "by implementing safeguards, we intend to ensure that *LECs* cooperate fully in the provision of any necessary payphone services and do not otherwise restrain competition, as long as *LECs* remain the monopoly providers of these services." *Id.*, ¶ 14 (emphases added).

Mindful of these real-world impediments and of the statutory directive to promote competition and deployment, the FCC adopted the "new services test" ("NST") as a price *floor* and a price *ceiling* on the lines used by PSPs to connect to the local exchange network. Under the NST, the price is set at a level that recovers direct costs plus a "reasonable" amount of overhead costs. *See* 47 C.F.R. § 61.49.

The FCC originally required that LECs file federal tariffs for payphone line services so that the FCC could directly review compliance with the NST and other requirements. *See First Payphone Order*, ¶ 147. On reconsideration, however, the FCC altered this requirement, directing instead that "LECs must file [basic payphone line] tariffs with the state." *Reconsideration Order*, ¶ 162. The FCC *specifically rejected* the

arguments of BellSouth and the Ohio Public Utilities Commission that the FCC lacks jurisdiction under § 276 to impose a federal pricing regime on payphone service. *See id.* Moreover, the FCC explicitly retained jurisdiction under § 276 to ensure that LECs complied with the NST. *See id.*, ¶ 163. These determinations, made in 1996, were never challenged or appealed.

LECs were required to bring their payphone line services into compliance with the NST pricing regime by April 15, 1997. *See id.* The FCC expressly required the LECs to have compliant tariffs by that date as a condition of their eligibility to receive dial-around compensation. *See id.*, ¶¶ 131-32.

In a subsequent order, the FCC confirmed that "*LECs'* intrastate [payphone] tariffs are subject to the [NST]." *Payphone Rulemaking*, Order, 12 FCC Rcd 20997 (1997) ("*Clarification Order*"), ¶ 30 n.91 (emphasis added). The FCC also confirmed that "*LEC* intrastate tariffs must comply with these requirements by April 15, 1997, in order for the payphone operations of the *LECs* to receive payphone compensation." *Id.*, ¶ 30 (emphases added); *see also id.*, ¶¶ 2, 31-33, 35 (repeating these requirements). No LEC ever sought reconsideration or review of this order.

A coalition of BOCs then sought a limited, 45-day waiver of the April 15, 1997, deadline to allow additional time to comply with the NST requirement. In granting this waiver, which enabled the LECs to remain eligible to receive payphone dial-around compensation as of April 15, 1997, the FCC reaffirmed that "*LECs* must comply with this [NST] requirement" with respect to *intrastate* payphone line services. *See Payphone Rulemaking*, Order, 12 FCC Rcd 21370 (1997) ("*Waiver Order*"), ¶ 24 (emphasis added). Once again, no LEC sought reconsideration or review of this order.

The FCC repeated these rulings yet again in a series of orders issued in connection with a decision of the North

Carolina Utilities Commission refusing to review the rates of the North Carolina LECs for compliance with the NST.[3] No LEC sought reconsideration or review of these orders either.

Relying on this unbroken string of FCC rulings, numerous states held proceedings to review LECs' rates for payphone line service,[4] and many applied the NST to non-BOC LECs.[5]

3. On February 4, 1998, the Wisconsin Pay Telephone Association ("WPTA") petitioned the FCC to review directly, under the NST, the rates of several LECs in Wisconsin, noting that the state commission had refused to undertake such an inquiry.

On March 2, 2000, the FCC instituted a proceeding to review the payphone line rates of Wisconsin LECs. *See In the Matter of Wisconsin Public Service Commission Order Directing Filings*, Order, 15 FCC Rcd 9978 (2000) ("*Wisconsin Bureau Order*"). This order directed certain Wisconsin LECs to file copies of their state tariffs and cost support studies associated with payphone line services in Wisconsin. The order also gave general guidance concerning the application of the NST to aid LECs "in the implementation of *Payphone Order-*

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[3] *See, e.g., In the Matter of North Carolina Utilities Commission Order Dismissing and Directing Filings*, Order, 13 FCC Rcd 5313, 5315 (1998) (directing "*all incumbent LECs* in North Carolina to file tariffs for certain intrastate payphone service offerings with the [FCC] . . . to demonstrate compliance with the [NST]" (emphasis added)).

[4] *See, e.g., Wisconsin Order*, ¶ 2 n.10 (App. 22a) (citing references to more than 15 state commission proceedings).

[5] See, for example, the Order in Administrative Case No. 361 (Ky. P.S.C. Jan. 5, 1999); the Order Setting Rates for Payphone Lines and Associated Features, Order No. 1999-285, in Docket No. 97-124-C, (S.C. P.S.C. Apr. 19, 1999); the Final Order in Cause No. 40830 (Ind. U.R.C. Oct. 6, 1999) and the Order on Less Than All of the Issues (Ind. U.R.C. Sept. 6, 2000); and the Interim Order in Docket No. 97-00409 (Tenn. Reg. Auth. Feb. 1, 2001).

compliant tariff filings." *Id.*, ¶ 8. As in all the FCC's earlier orders, the *Wisconsin Bureau Order* confirmed that the NST applied to *LECs'* state payphone tariffs and made no distinction between BOCs and non-BOC LECs. *See id.*, ¶¶ 2, 5-6.

A group calling itself the LEC Coalition[6] filed an application for review of the *Wisconsin Bureau Order* by the full Commission challenging the FCC's authority to require compliance with the federal tariffing regime – even though the FCC had rejected such a challenge nearly four years previously in its *Reconsideration Order*. The LEC Coalition's challenge did not distinguish between BOCs and non-BOC LECs with regards to the FCC's jurisdiction.

On January 31, 2002, in the *Wisconsin Order* that was under review below, the FCC affirmed the application of the NST to BOCs, gave further guidance concerning the application of the NST, and urged the Wisconsin Commission to review its jurisdiction to apply the NST to Wisconsin BOCs. However, the FCC summarily reversed its prior rulings applying the NST to non-BOC LEC payphone lines. The FCC concluded:

> It is important to note that we require only BOCs, and not LECs generally, to provide payphone lines at cost-based rates. Because sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since there are statutory provisions that empower us to apply the [NST]

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[6] All members of the coalition except GTE, now part of Verizon, are actually BOCs.

> to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates. Although the federal regulatory program implemented in section 276 would surely benefit if all LECs were required to use cost-based rates for their payphone line services, we cannot say that, with respect to non-BOC LECs, Congress has spoken with sufficient clarity to overcome the presumption of section 2(b).

Wisconsin Order, ¶ 42 (App. 45a-46a). Without further explanation, the FCC swept away six years of consistent, contrary rulings on this issue, negating the former comprehensive reach of § 276.

Despite holding that it has no jurisdiction to require non-BOC LEC compliance with the NST, the FCC made it clear that it wished it could hold otherwise and encouraged the states to do what it believed it could not: "We do, however, encourage states to apply the [NST] to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines." *Id.*

4. The effect of the FCC's summary reversal is dramatic. Approximately 1200 LECs are not BOCs, including Verizon's former GTE operating companies and other large LECs such as Sprint and ALLTEL.

Nationwide, approximately 30% of all independently-owned payphones are deployed in non-BOC LEC territory. However, in North Carolina, approximately 60% of independent payphones are in non-BOC LEC territory. Similarly, the geographic areas served by non-BOC LECs are

also quite substantial. Significantly, non-BOC LECs typically serve more rural areas in the nation. By exempting non-BOC LECs from the federal NST safeguard against excessive line and usage rates, the FCC effectively denied the benefits of a fully-competitive marketplace to consumers in these areas.

5. On review of the FCC's *Wisconsin Order*, the D.C. Circuit affirmed the order in all respects. The court rejected NCPA's argument that the FCC's authority necessarily extended to the payphone access line and usage rates of non-BOC LECs, reasoning, first, that § 276 refers expressly only to BOCs and, therefore, that Congress must have intended that BOCs and non-BOC LECs be subject to different regulatory schemes. *See NEPCC*, 334 F.3d at 78 (App. 16a). The court also rejected the view that the FCC could invoke other statutory provisions to confer upon it the requisite authority to regulate the payphone access line and usage rates of non-BOC LECs, holding that the provisions of §§ 201(b), 202(a), and 205(a) cannot trump § 2(b)'s command that the FCC cannot reach intrastate matters absent express Congressional language to the contrary. *See id.* (App. 17a).

The court summarily denied a petition for rehearing and rehearing en banc.

6. The D.C. Circuit possessed subject matter jurisdiction pursuant to 47 U.S.C. § 402, 28 U.S.C. § 2342, and 28 U.S.C. § 2344.

Reasons for Granting the Writ

This Court should grant a writ of certiorari to review the decision below because that decision is in conflict with this Court's decision in *AT&T* and creates a cramped view of agency jurisdiction totally at odds with the well-established authority of agencies to "fill in the gaps" that Congress leaves to their expertise. Left undisturbed, the decision creates

confusion in the critical jurisdictional issue of when the FCC may act concerning intrastate matters and serves to erode the otherwise clear guidance given by the Court in *AT&T*.

The consequence of the decision is to enable an agency to frustrate the intent of Congress to have a comprehensive regulatory regime implemented. This concern is not merely hypothetical, as the result in this case has been to deny the benefits of the pro-competitive benefits of § 276 to approximately one-third of all independent PSP payphones.

1. In holding that, because § 276 does not unequivocally grant the FCC the authority to regulate non-BOC LECs, the FCC is without jurisdiction to reach the intrastate payphone rates of non-BOC LECs, the court below misapprehended the question before it and, in so doing, created a decision that is inconsistent with this Court's decision in *AT&T*. The central jurisdictional question is not whether there is an unequivocal grant of authority to regulate *non-BOC LECs*, but, rather, the central jurisdictional question is whether there is an unequivocal grant of authority to reach *intrastate rates*. This is the only jurisdictional "fence" that § 2(b) of the Act imposes. Once that "intrastate" hurdle has been scaled, the issue of which species of *carriers* the FCC may regulate is a different question altogether, one that is resolved through standard means of statutory interpretation, which, in this case, turns on whether Congress has granted the FCC the requisite authority to "fill in the gaps."

The court below correctly ruled that § 276 does, in fact, scale the § 2(b) hurdle, otherwise it could not have held that the FCC can regulate the intrastate payphone rates of BOCs. *See, e.g., NEPCC*, 334 F.3d at 75 (App. 12a) ("Here we find that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates."). But once § 2(b) has been scaled, *AT&T* makes it absolutely clear that the FCC's general rulemaking authority

cuts a broad swath by which the FCC may regulate intrastate matters, and, in this case, that must necessarily reach the payphone rates of non-BOC LECs. In other words, while it may have been permissible for the FCC to decline to extend the § 276 benefits to non-BOC LECs as a matter of discretion (although such a decision would be subject to challenge as arbitrary and capricious), it was impermissible for the FCC to attempt to sidestep consideration of its discretion by concluding it had no jurisdiction to act. *Cf. New York v. FERC*, 535 U.S. 1, 122 S. Ct. 1012, 1027-28 (2002) (affirming FERC's refusal to apply open access remedy to bundled intrastate retail transmissions of electricity because FERC did not find that it was without jurisdiction to act but rather because it had simply declined to exercise the jurisdiction that it possessed).

This Court in *AT&T* was confronted precisely with the question of whether and the extent to which the FCC could regulate intrastate matters in light of the 1996 Act. There the issue revolved around certain pricing and nonpricing provisions affecting local telephone competition. Although § 251 and § 252, 47 U.S.C. §§ 251-252, were *less* explicit in reaching intrastate matters than § 276 is here, the Court had no difficulty in finding the § 2(b) jurisdiction hurdle overcome and in giving the FCC virtually free rein in intrastate matters pursuant to the general rulemaking authority under § 201(b) of the Act. As the Court observed, "[T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *AT&T*, 525 U.S. at 378 n.6. Payphone matters are, unquestionably, addressed by the 1996 Act in § 276.

The Court also expressly rejected the LECs' arguments in that case that something more than intrastate application was required to overcome § 2(b). Specifically, the Court rejected the LECs' argument that "application" to intrastate service as

well as an "explicit conferral of Commission jurisdiction" over intrastate service must be found to exist. *See AT&T*, 525 U.S. at 380. The D.C. Circuit's "intrastate plus" interpretation of § 2(b) in this case falls into the very trap rejected by this Court in *AT&T*. As made clear in *AT&T*, nothing more than intrastate application is required to overcome § 2(b); once this hurdle is scaled, all that is left is to apply standard principles of statutory interpretation, a step never reached by the FCC in the *Wisconsin Order* because of its erroneous belief that § 2(b) could not be overcome with respect to the intrastate rates of non-BOC LECs.

To counsel's knowledge, the D.C. Circuit's "intrastate plus" interpretation of § 2(b) is *sui generis*. No other court has construed § 2(b) in this manner and, indeed, the D.C. Circuit's own earlier construction of § 2(b)'s application to § 276 with regard to the preemption of local coin rates did not apply an "intrastate plus" requirement and did not distinguish between the local coin rates in BOC areas and the local coin rates in non-BOC LEC areas. *See Illinois Pub. Telecommunications Ass'n v. FCC*, 117 F.3d 555, 561-63, *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997) ("*IPTA*"), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998). Rather, in that case, the court correctly found that § 276 affected local coin rates and, therefore, gave the FCC the authority to act with respect to those rates, regardless of whose territory those phones resided in. This case is nothing more than the natural extension of the *IPTA* case, as the FCC's reliance on a market-based deregulated local coin rate in *IPTA* makes little sense if the inputs to that rate (i.e., the line rate) are allowed to be priced by non-BOC LECs in an anti-competitive fashion.

The court below did not attempt to justify its interpretation by reference to the language of § 2(b) itself. On its face, it is apparent that § 2(b) is concerned with the subject of intrastate "charges, classifications, practices, services, facilities, or regulations" of all carriers rather than particular classes of

carriers. This is as it should be because the jurisdictional concept advanced by § 2(b) is that intrastate charges and practices in general—not the rates and practices of particular classes of carriers—are not subject to regulation by the FCC.

Once § 2(b) is overcome through a finding of intrastate application under *AT&T*, other provisions of the Act contain general grants of authority sufficient in this case to allow the extension of the § 276 regulatory regime to non-BOC LECs.

Section 201(b) of the Act provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b) (App. 65a). This Court's ruling in *AT&T* is directly applicable here: "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions' of this Act, which include[s § 276], added by the Telecommunications Act of 1996." *AT&T*, 525 U.S. at 378.

Other provisions of the Act, which were not in issue in *AT&T*, also give the FCC the requisite authority to regulate the payphone rates of non-BOC LECs. For example, § 202(a) makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services." 47 U.S.C. § 202(a) (App. 65a). Because excessively priced payphone rates are discriminatory charges prohibited by § 202, the FCC has authority to regulate payphone rates, irrespective of whether such regulation governs BOCs or non-BOC LECs. In other words, § 202 gives the FCC jurisdiction to regulate *rates*, not parties, and so long as the FCC is regulating rates, it can regulate all service providers—BOCs and non-BOC LECs alike.

In addition, § 205(a) authorizes the FCC to prescribe just and reasonable charges. *See id.*, § 205(a) (App. 66a). Like § 202(a), § 205(a) makes no distinction between BOCs and

non-BOC LECs. Given the posture of this matter, the FCC is clearly authorized to require non-BOC LECs to offer only cost-based rates in accordance with the NST, just as the D.C. Circuit held the FCC may do for BOCs.[7]

The court below, however, reasoned that these general provisions in §§ 201(b), 202(a), and 205(a) cannot trump § 2(b)'s specific command. *See NEPCC*, 334 F.3d at 78 (App. 17a). But as this Court said in *AT&T* with respect to identical reasoning concerning § 201(b), "The fallacy in this reasoning is that it ignores the fact that § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *AT&T*, 525 U.S. at 380 (emphasis in original). Although the court below purports to rely on *AT&T*, *see NEPCC*, 334 F.3d at 78 (App. 17a) (citing *AT&T*, 525 U.S. at 381 n.8 ("Insofar as Congress has remained silent . . . § 152(b) continues to function.")), the court has simply conflated *who* can be regulated with *what* can be regulated. In fact, as that note 8 makes clear, the "silence" to which this Court was referring is silence only as to "intrastate communication service," 47 U.S.C. § 152(b). *See AT&T*, 525 U.S. at 381 n.8 (rejecting Justice Thomas's reading that FCC jurisdiction only extends to those matters upon which jurisdiction is expressly conferred, an interpretation that "produces a most chopped-up statute" for which it is "most unlikely that Congress created such a strange hodgepodge"). As even the FCC conceded in its brief below: "If Congress has injected the FCC into intrastate matters in another statute, § 201(b) can come into play, as it did in *Iowa Utilities Board*." FCC *NEPCC* Br. at 37. That is precisely what Congress did in § 276, as the court below necessarily concluded with respect to BOC

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[7] It also significant that the FCC—until the *Wisconsin Order* itself—consistently relied upon these very provisions of the Act to apply the § 276 requirements to non-BOC LECs. *See, e.g., First Payphone Order*, ¶ 146 (relying on §§ 201 & 202); *Reconsideration Order*, ¶ 146 (relying on §§ 201 & 202); *Wisconsin Bureau Order*, ¶ 6 & n.14 (relying on §§ 205 & 154(i)).

payphone access line and usage rates.

The court below thought "that when Congress referred to 'Bell operating companies' rather than 'local exchange carriers,' it acted deliberately." *NEPCC*, 334 F.3d at 78 (App. 16a). Congress did act deliberately, but not in the way that the court supposes. By specifically referring to BOCs, Congress was telling the FCC that it was *required* to take certain actions with respect to this species of carriers. But it is incorrect, as a matter of statutory interpretation, to read these specific requirements as to BOCs as limiting the FCC's jurisdiction to reach beyond BOCs. It is precisely as this Court observed in *AT&T*: "It seems to us not peculiar that the *mandated* regulations should be specifically referenced, whereas regulations *permitted* pursuant to the Commission's § 201(b) authority are not." *AT&T*, 525 U.S. at 385 (emphases added); *cf. id.* at 383 n.9 ("Section 251(e) . . . *requires* the Commission to exercise its rulemaking authority, as opposed to § 201(b), which merely authorizes the Commission to promulgate rules if it so chooses." (emphasis in original)). In other words, § 276(b)(1)(C)'s specific mandate to apply the NST to BOCs does not limit the scope of other provisions of § 276 and the Act that *permit* the FCC to apply the NST to all LECs. There is simply no conflict between § 276(b)(1)(C)'s BOC-directed requirement and the FCC's expressed desire to apply the same NST to non-BOC LECs.[8]

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[8] The canon of statutory construction calling for specific provisions to be given effect over more general terms does not require the D.C. Circuit's result. As the Court noted recently:

> It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope. The sum of the transactions addressed by the rate formulas . . . is less than the theoretical coverage of the Act as a whole.

(continued...)

The reliance by the court below on *National Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001), relying in turn upon *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989), is, accordingly, misplaced. Like the circular reasoning that Judge Randolph faulted in his concurring opinion in that case, *see National Pub. Radio*, 254 F.3d at 231 (Randolph, J., concurring), here the court has transposed the proper questions to be asked and answered. The court essentially asks, does § 276 refer to non-BOC LECs and does § 201(b) allow the FCC to reach intrastate rates? Answering both questions "no," NCPA and the independent PSP industry lose. But the questions should have been, does § 276 refer to intrastate rates and does § 201(b) [and/or § 202(a), § 205(a), and § 276] allow the FCC to reach non-BOC LECs? The court itself concluded that the answer to the first question is "yes," and an affirmative answer to the second question follows from *AT&T* itself.

2. Even if the court's opinion were not in conflict with this Court's holding in *AT&T*, its holding with respect to the FCC's jurisdiction would raise exceptional questions about the ability of federal agencies to "fill the gaps" that Congress leaves to its implementing agencies. *See, e.g., AT&T*, 525 U.S. at 397 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." (citing *Chevron*)). It cannot be the case that, to take the FCC as an example, unless Congress has specifically directed it to act in a particular way with respect to particular carriers, it has no authority at all and it can never fill in the gaps, even when such a gap is as gaping as promoting fair competition in a large segment of the telephone industry in

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[8](...continued)

National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 336 (2002); *cf. Cellular Telecommunications Indus. Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

what is clearly intended to be a comprehensive statute. If that were true, agencies would not need rulemaking authority of their own, like that provided in § 201(b), but simply enforcement authority over the express requirements that Congress writes into the statutes. More problematic still would be the agency that intentionally reads its jurisdiction as narrowly as possible, or narrowly in one case and expansively in another, frustrating the intent of Congress to have a comprehensive regulatory regime implemented. Certainly courts have not traditionally taken such a cramped view of agency jurisdiction nor allowed agencies to shirk their obligations to implement statutory grants of authority. *See, e.g., Bargmann v. Helms*, 715 F.2d 638, 641-43 (D.C. Cir. 1983) (reversing FAA's "refusal to exercise its discretion, based on its belief that it has no power to do otherwise"); *cf. New York v. FERC*, 122 S. Ct. at 1027-28 (affirming FERC's refusal to act where FERC did not find that it was without jurisdiction to act but rather had simply declined to exercise the jurisdiction that it possessed).

In this case, it is certain that Congress did enact a comprehensive scheme for payphone regulation, a scheme that is being frustrated by the court's misapprehension of the question before it. Section 276 itself proclaims its purpose is "to promote competition among [PSPs] and promote the *widespread* deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1) (emphasis added); *see also First Payphone Order*, ¶ 2. In fact, in the *Wisconsin Order* itself, the FCC found that "Section 276 establishes a *comprehensive* federal scheme of payphone regulation, both intra- and interstate, to be administered by the Commission." *Wisconsin Order*, ¶ 35 (App. 40a) (emphasis added). Although the FCC found "no evidence that Congress intended [it] to implement . . . a fractured regime," *Wisconsin Order*, ¶ 38 (App. 43a), the FCC's decision to withdraw its valid assertion of jurisdiction over non-BOC LEC rates contained in its

original order—now affirmed by the court below—results in precisely that perverse outcome and thus frustrates the "comprehensive" nature of the federal scheme contemplated by Congress. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (observing that a court must "interpret the statute as a symmetrical and coherent regulatory scheme" (internal quotation marks and citation omitted)); *Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 740 F.2d 271, 273 (3d Cir. 1984). Together, the FCC and D.C. Circuit decisions remove 1200 non-BOC LECs and **one-third** of all independent payphones from the scope of a "comprehensive" statute, leaving the explicit purposes of the statute grossly unfulfilled. "So paradoxical a purpose should not be imputed to the Congress without very strong evidence that this was its intent." *United Mine Workers v. Federal Mine Safety & Health Review Comm'n*, 671 F.2d 615, 625-26 (D.C. Cir. 1982). Moreover, just as this Court observed in *AT&T* that it would be "surpassing strange" to interpret the 1996 Act to require the public utilities commissions of all 50 states to administer the federal program established by the 1996 Act, *AT&T*, 525 U.S. at 378 n.6, here it is even stranger to interpret § 276 as requiring the FCC to administer the NST portion of the competitive payphone provisions for BOCs but 50 other agencies to administer it for non-BOC LECs.

It need not be so. The FCC has already made it clear how it would apply its discretion if its authority were confirmed: "We . . . encourage states to apply the [NST] to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines." *Wisconsin Order* at ¶ 42 (App. 46a); *see also* FCC *NEPCC* Br. at 34 ("'[T]he federal regulatory program implemented in section 276 would surely benefit if all LECs' were subject to the [NST]." (quoting *Wisconsin Order* at ¶ 42)). That is the result that should have obtained had *AT&T* been properly

applied, a result that avoids the otherwise "surpassing strange" hodgepodge the D.C. Circuit has engrafted onto the 1996 Act with its "intrastate plus" approach.

Despite the FCC's encouragement in the *Wisconsin Order*, state regulatory commissions have not stepped in to fill the void left by the FCC in its implementation of § 276. To counsel's knowledge, no state commission has elected to voluntarily apply the NST to non-BOC LECs as a result of the *Wisconsin Order*.

3. This concern as to the FCC's failure to ensure fair payphone competition in non-BOC LEC territory is not hypothetical or trivial. Payphones serve important public purposes through their availability to transient users and others without access to home or mobile phones, and their importance has been underscored during recent national emergencies where the mobile phone network has been comprised or inoperable. *See, e.g.*, Eric Wolff, "Hardy Breed in Blackout: Payphones," *The New York Sun* (Aug. 21, 2003); "Payphones Served Valuable Role During Blackout As Call Volumes More Than Triple at Verizon's Curbside Phones," *Silicon Valley Biz Ink* (Aug. 20, 2003). However, despite the Congressional intent in § 276 to promote the widespread deployment of payphones, their numbers have been dwindling, and many LECs have been exiting the payphone business altogether. *See, e.g.*, Matthew Coleman, "County Considers New Options As BellSouth Cuts Pay Phones," *The Daily Leader* (Brookhaven, Miss.) (Oct. 2, 2003); Bruce Edwards, "Pay Phones in Vermont Declining," *The Rutland Herald Online* (Oct. 4, 2003); "Pay Phones Fading Away Across South Carolina," *The State* (Columbia, S.C.) (Nov. 9, 2003); Billy Corriher, "BellSouth Bowing Out of the Pay Phone Biz," henryherald.com (Henry County, Ga.). The reduction in the number of payphones available to the public will be especially felt in rural areas, which are predominately served by non-BOC LECs, areas where the public has less access to

mobile phone services and where the FCC has refused to extend the pro-competitive benefits of § 276 because of its perceived lack of jurisdiction.

This cannot be the result Congress intended or envisioned in enacting § 276.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 2003

United States Court Of Appeals
For The District Of Columbia Circuit

Argued May 9, 2003 Decided July 11, 2003

No. 02-1055

NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

AMERICAN PUBLIC COMMUNICATIONS COUNCIL, ET AL.,
INTERVENORS

Consolidated with
02-1091, 02-1092, 02-1105

On Petitions for Review of an Order of the
Federal Communications Commission

Rehearing and Rehearing En Banc Denied Sept. 22, 2003.*

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* Circuit Judge Henderson did not participate in this matter.

Aaron M. Panner argued the cause for Bell Operating Company petitioners. With him on the briefs were *Michael K. Kellogg, James G. Garralson, Michael E. Glover, Edward Shakin, John M. Goodman, James D. Ellis* and *Gary L. Phillips.*

Marcus W. Trathen argued the cause for petitioners New England Public Communications Council, Inc., et al. With him on the briefs were *Paul C. Besozzi* and *David Kushner.*

Joel Marcus, Counsel, Federal Communications Commission, argued the cause for respondent. With him on the brief were *R. Hewitt Pate,* Acting Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Robert J. Wiggers,* Attorneys, *John A. Rogovin,* Acting General Counsel, Federal Communications Commission, and *John E. Ingle,* Deputy Associate General Counsel. *Lisa E. Boehley,* Counsel, Federal Communications Commission, entered an appearance.

Robert F. Aldrich argued the cause for intervenor American Public Communications Council, Inc. With him on the brief was *Albert H. Kramer.*

Aaron M. Panner argued the cause for LEC intervenors. With him on the brief were *Michael K. Kellogg, James G. Harralson, Michael E. Glover, Edward Shakin, John M. Goodman, James D. Ellis* and *Gary G. Phillips. Peter M. Connolly* entered an appearance.

Before: GINSBURG, *Chief Judge,* and ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* TATEL.

*71 TATEL, Circuit Judge: Acting pursuant to a 1996 Telecommunications Act provision designed to promote

competition in the payphone service industry, the Federal Communications Commission issued an order requiring the Bell operating companies (BOCs) to price the service lines used by payphone service providers at forward-looking cost-based rates. In these consolidated cases, two groups of petitioners challenge the order from opposing points of view. One group, composed of BOCs, challenges the Commission's authority to require a specific rate-setting methodology for intrastate payphone lines. The other group, composed of payphone service providers that use non-BOC local exchange carriers' payphone lines, challenges the Commission's decision to limit the forward-looking cost-based methodology requirement to BOCs. Concluding that the Telecommunications Act authorizes the Commission to regulate BOC intrastate payphone line rates, but not those of non-BOC local exchange carriers, we deny the petitions for review and affirm the Commission's order in all respects.

I.

Until the mid-1980s, because payphones could not be operated separately from local exchange service, only local exchange carriers (LECs) provided payphone service. *See Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 558 (D.C. Cir.1997) (per curiam). For that reason, the LECs—which, thanks to the 1982 consent decree under which AT&T divested its local exchange carriers, were primarily BOCs, *see United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983)—generally subsidized the cost of payphone equipment and service with revenues from their other services. In the mid-1980s, however, advances in payphone technology enabled independent, non-LEC payphone service providers (PSPs) to enter the payphone market. But because the LECs owned the payphone lines used by all PSPs, they were able to continue to subsidize and

otherwise discriminate in favor of their own payphone service. *See generally* In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 6716, 6718-20 ¶¶ 2-6, 1996 WL 436930 (1996) (Notice of Proposed Rulemaking).

In the Telecommunications Act of 1996, Congress fundamentally restructured the local telephone industry. Section 276 of the Act, which is specifically aimed at promoting competition in the payphone service industry, prohibits "any Bell operating company that provides payphone service" from subsidizing or discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also authorizes the Commission to prescribe regulations consistent with the goal of promoting competition, requiring that the Commission take five specific steps toward that goal. One of these steps is "prescrib[ing] a set of nonstructural safeguards for Bell operating company payphone service" that "shall, at a minimum, include the nonstructural safeguards equal" to those governing BOCs' provision of enhanced services—the so-called *Computer III* safeguards. *Id.* § 276(b)(1)(C). Finally, recognizing that the prescribed regulations would trench on state authority, Congress provided that section 276 preempts state law "[t]o the extent that any State requirements are inconsistent with the Commission's regulations." *Id.* § 276(c).

The Commission implemented section 276 in a series of orders, beginning with the so-called *Payphone Orders*. In the *72 Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 20541, 1996 WL 547458 (1996) (Report and Order) ("*First Payphone Order*"); Order on Reconsideration, 11 F.C.C.R. 21233, 1996 WL 658824 (1996) ("*Payphone Reconsideration Order*"). Among other things, these orders require that incumbent LECs provide

"individual central office coin transmission services to PSPs" at rates that satisfy the flexible, cost-based "new services test" that developed as an outgrowth of the *Computer III* proceeding. *First Payphone Order*, 11 F.C.C.R at 20614 ¶ 146. Specifically, in an order following the initial *Computer III* order, the Commission directed that service element rates be set at the direct costs of providing the service element, plus "an appropriate level of overhead costs." In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, 6 F.C.C.R. 4524, 4531 ¶¶ 38-41, 44, 1991 WL 638513 (1991) (Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking) ("*Access Charge Subelements Order*"). In the *Payphone Reconsideration Order*, the Commission clarified that while the states, not the Commission, would review the LECs' intrastate payphone line tariffs, the states must ensure that the tariffs are "(1) cost-based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies ... ; and (3) nondiscriminatory," and that the states "must apply ... the Computer III guidelines for tariffing such intrastate services." 11 F.C.C.R. at 21308 ¶ 163.

In 1997, a group of independent PSPs petitioned the Wisconsin Public Service Commission to determine whether Wisconsin LECs' payphone line service tariffs complied with the new services test. The Wisconsin Commission denied the request, finding its jurisdiction under state law limited to "enforcing a prohibition on cross subsidy ... and prohibitions on discriminatory practices." Letter from Public Service Commission of Wisconsin to Andrew J. Phillips, Yakes, Bauer, Kindt & Phillips (Nov. 6, 1997). The FCC's Common Carrier Bureau, concluding that "[t]he Wisconsin Commission's stated lack of authority to review these payphone service offerings invokes this Commission's obligations under section 276 and

the Commission's *Payphone Orders*," directed the four largest Wisconsin LECs to file with the Commission "tariffs for intrastate payphone service offerings ... together with the supporting documentation ... necessary to demonstrate compliance with the requirements of section 276 and the Commission's implementing rules." In the Matter of Wisconsin Public Service Commission, 15 F.C.C.R. 9978, 9980 ¶ 5, 2000 WL 232182 (2000) (Order) ("*Bureau Order*") (footnotes omitted); *see also* Letter of October 28, 1998, from Kathryn C. Brown, Chief, Common Carrier Bureau, to Hon. Joseph P. Mettner, Chairman, Public Service Commission of Wisconsin, 13 F.C.C.R. 20865, 20865, 1998 WL 751151 (1998). The Bureau also notified the LECs that it would examine their tariffs using "an appropriate forward-looking, economic cost methodology" consistent with principles the Commission set forth in its 1996 *Local Competition Order*, in which the Commission implemented the Telecommunications Act's local telephone market deregulation provisions, 47 U.S.C. §§ 251, 252. *Bureau Order*, 15 F.C.C.R. at 9981 ¶ 9; *see also* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, 1996 WL 452885 (1996) ***73** (Report and Order) ("*Local Competition Order*"). In that proceeding, the Commission prescribed a method for setting rates at which incumbent LECs would provide network elements to their competitors based not on the original, historical cost of the equipment used to provide service, but rather on the current cost of providing service using existing equipment. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 495-97, 122 S.Ct. 1646, 1664-65, 152 L.Ed.2d 701 (2002) (upholding the forward-looking cost methodology against the incumbents' challenge).

A coalition of LECs applied for review of the Bureau's order, primarily challenging the Bureau's decision to use forward-looking methodologies in applying the new services test. Citing 47 U.S.C. section 152(b), which provides that

"nothing in th[e] Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service," the coalition also contested the Commission's jurisdiction to regulate intrastate payphone line rates.

In the order under review in this case, the Commission determined that sections 276(a)(2) and 276(b)(1)(C) establish its jurisdiction to regulate intrastate payphone line rates and thus override section 152(b). It also concluded, however, that its jurisdiction is limited to regulating BOCs' payphone line rates, since those provisions, by their terms, apply only to BOCs, and Congress had not "expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs." In the Matter of Wisconsin Public Service Commission, 17 F.C.C.R. 2051, 2064 ¶ 42, 2002 WL 122570 (2002) (Order Directing Filings) ("*Wisconsin Order*"). Finally, the Commission upheld the Bureau's decision to use a forward-looking cost-based methodology in applying the new services test. *Id.* at 2065 ¶ 43 & n. 100.

A group of BOCs now petitions for review, principally contending that the Commission lacks jurisdiction to enter the field of intrastate telephone service rate-making. Another set of petitioners, PSP trade associations New England Public Communications Council, Inc. and North Carolina Payphone Association, Inc., by contrast, not only endorses the Commission's decision to impose a forward-looking cost methodology on states setting intrastate payphone line rates, but also faults the Commission for failing to apply the same standard to the non-BOC LECs from which their members, all independent PSPs, purchase their payphone line service.

II.

Before considering the merits, we must address the Commission's threshold argument that petitioners lack Article III standing to challenge its *Wisconsin Order*. Specifically, the Commission contends that because it has done no more than establish a standard for the Wisconsin Public Services Commission to apply in evaluating the Wisconsin BOCs' tariffs, and because it has "made no determination as to the actual payphone line rate to be charged in Wisconsin or anywhere else," neither the BOC petitioners nor the PSP petitioners have suffered an "actual or imminent" injury that is both "fairly traceable" to the *Wisconsin Order* and "likely" to be "redressed by a favorable decision," as Article III requires, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). Respondents' Br. at 18. According to the Commission, in order to satisfy Article III, petitioners *74 must show that they have already suffered financial injury: that is, the BOCs must show that they have to charge less for payphone line service than they otherwise would have, and the PSPs must show that they will be required to pay more for payphone line service than they would if the Commission had asserted jurisdiction over nonBOC LECs' line rates. Respondents' Br. at 18-19. For that reason, the Commission argues, petitioners' challenge is premature: We cannot know whether the Commission's order directing the states to apply a particular rate-setting methodology will injure the petitioners until the states act.

Contrary to the Commission's argument, neither set of petitioners need wait for the states to review the LECs' tariffs before challenging the *Wisconsin Order*. *Cf. Verizon*, 535 U.S. at 476, 122 S.Ct. at 1654 (reviewing a challenge to the Commission's prescription of a forward-looking cost-based rate-setting methodology to be applied by state commissions).

The BOCs' injury is both clear and immediate: The *Order*'s forward-looking cost-based methodology means that the BOCs cannot recover certain expenses beyond the current costs of providing service—namely, expenses owing to inefficiencies such as poor management or inflated capital and depreciation—that they could recover under a historical-cost method. *See id.* at 511-12, 122 S.Ct. at 1672-74. To comply with the *Wisconsin Order*, the BOCs will almost certainly have to modify their tariffs to lower their existing rates—or at the very least, refrain from raising their rates—before submitting the tariffs for state review. This injury, moreover, is both directly traceable to the *Wisconsin Order* and redressable by a decision in the BOCs' favor.

The PSP petitioners also suffer immediate injury. The *Wisconsin Order*, by departing from the *Payphone Orders* regime under which the new services test applied to both BOCs and non-BOC LECs, leaves the latter group free to set rates that discriminate against competitor PSPs. We have repeatedly held that "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir.1998). While it is true, as the Commission points out, that the states may decide on their own to apply the new services test to non-BOC LECs, the PSP petitioners need not wait for the states to set the LECs' payphone line rates before bringing their challenge. It suffices for the PSP petitioners to show that the *Wisconsin Order* has "the clear and immediate potential ... to hurt them competitively." *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir.1990). This court "ha[s] not required litigants to wait until increased competition actually occurs." *Louisiana Energy & Power Auth.*, 141 F.3d at 367.

Mounting a second challenge to the PSP petitioners' standing, the Commission pointed out in its brief that both

petitioners are out-of-state trade groups that failed to allege in their opening brief that they have any members that would be directly affected by the Wisconsin rate-setting proceedings. In response, the PSP petitioners moved for leave to file supplemental affidavits indicating that NCPA does have at least one member that operates in Wisconsin and whose payphones connect to the network via non-BOC LECs. Though the Commission does not oppose the motion, it draws our attention to this court's recent statement in *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir.2002), that "a petitioner whose standing is not self-evident should establish its standing by the submission of its arguments and ***75** any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding," and that litigants "should not expect" this court to depart from that rule "[a]bsent good cause shown." *Id.* at 900. We have no need to consider the application of *Sierra Club* in this case, however, since the PSP petitioners' standing in no way turns on their members' connections to Wisconsin. Contrary to the Commission's argument, the order on review is more than just "an adjudicatory-type proceeding ... pertaining to rates in Wisconsin." Respondents' Br. at 18. Instead, it establishes a rule that affects payphone line rates in every state. Indeed, the Commission itself acknowledged as much, noting that "this *Order* will assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276." *Wisconsin Order*, 17 F.C.C.R. at 2052 ¶ 2; *see also id.* at 2072 ¶ 68 ("[W]e issue this *Order* to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*.").

III.

This brings us to the merits of petitioners' challenges to the Commission's authority under section 276 to regulate the

BOCs' intrastate payphone line rates. The Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service," under which the Commission has the power to regulate "interstate and foreign commerce in wire and radio communication," 47 U.S.C. § 151, but is generally forbidden from entering the field of intrastate communication service, which remains the province of the states, *id.* § 152(b). *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 106 S.Ct. 1890, 1894, 90 L.Ed.2d 369 (1986); *see Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 561; *see also City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1155 (D.C. Cir.1987) ("[T]he FCC enjoys jurisdiction over interstate rates, whereas the several States reign supreme over intrastate rates.").

While the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the Commission may preempt state regulation of intrastate telephone service depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1899. The "best way" to answer that question, the Supreme Court has instructed, "is to examine the nature and scope of the authority granted by Congress to the agency." *Id.* at 374, 106 S.Ct. at 1901. In cases involving the Communications Act, that inquiry is guided by the language of section 152(b), which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction." *Id.* at 373, 106 S.Ct. at 1901. Applying this test in a challenge to the Commission's authority under section 276 of the 1996 Act, we have held that "§ 276 should not be read to confer upon the FCC jurisdiction ... unless § 276 is so unambiguous or straightforward so as to override the command of § 152(b)." *Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 561 (internal quotation marks omitted) (citing *Louisiana Pub. Serv. Comm'n*,

476 U.S. at 377, 106 S.Ct. at 1903).

Here we find that section 276 unambiguously and straightforwardly authorizes the Commission to regulate the BOCs' intrastate payphone line rates. Section 276(b) directs the Commission to implement section 276(a)'s anti-subsidy *76 and anti-discrimination mandates by undertaking five specific measures to promote "competition among payphone service providers and ... the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). Recognizing that the Commission's regulations implementing these commands would tread on ground traditionally occupied by the states, Congress included a preemption clause providing that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations," the Commission's regulations would preempt state law. *Id.* § 276(c); *see also* S. Rep. No. 104-230, at 158 (1996) ("In crafting implementing rules, the commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act [of 1934].").

Two of the five measures prescribed in section 276(b), moreover, expressly apply to intrastate service: subsection (b)(1)(A) directs the Commission to adopt regulations guaranteeing fair compensation for "*intrastate* and interstate call[s]," 47 U.S.C. § 276(b)(1)(A) (emphasis added), and (b)(1)(B) requires the Commission to "discontinue the *intrastate* and interstate carrier access charge payphone service elements ... and all *intrastate* and interstate payphone subsidies," *id.* § 276(b)(1)(B) (emphasis added). In fact, we have interpreted subsection (b)(1)(A) to permit Commission regulation of local coin rates, which was long the exclusive domain of the states. *Illinois Pub. Telecomms. Ass'n,* 117 F.3d at 561-63. And although subsections (b)(1)(D) and (b)(1)(E) do not use the word "intrastate," the two provisions authorize the

Commission to promulgate regulations concerning PSPs' selection of carriers for long-distance intraLATA and interLATA calls, both of which are often intrastate calls. *See* 47 U.S.C. § 276(b)(1)(D), (b)(1)(E). As the BOCs affirm, "the FCC could not carry out this mandate without addressing intrastate matters." BOC Petitioners' Br. at 12-13. All of these provisions, which authorize the Commission to regulate both intrastate and interstate service in implementing section 276(a)'s anti-subsidy and anti-discrimination commands, indicate that those commands, too, apply to both intrastate and interstate matters.

To be sure, as the BOC petitioners emphasize, the two provisions on which the Commission relied in the *Wisconsin Order*—section 276(a)(2)'s anti-discrimination command and section 276(b)(1)(C)'s requirement that the Commission prescribe *Computer III*-like nonstructural safeguards for BOC payphone service—do not use the word "intrastate." According to the BOCs, the omission of references to intrastate services in these provisions, set against the inclusion of explicit references to intrastate services in subsections (b)(1)(A) and (b)(1)(B), demonstrates that Congress did not intend for the Commission's regulations implementing sections 276(a)(2) and 276(b)(1)(C) to cover intrastate services. For support, they cite *Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983), in which the Supreme Court held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23, 104 S.Ct. at 300 (internal quotation marks and citation omitted). As *Russello* itself makes clear, however, it announces a presumption, not a hard-and-fast rule. Indeed, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999), the Supreme Court rejected a similar argument regarding the Commission's jurisdiction *77 to

create a pricing methodology for the states, holding that a "mere lack of parallelism is surely not enough to displace [the Commission's] explicit authority." *Id.* at 385, 119 S.Ct. at 733. The presumption that Congress deliberately omitted the word "intrastate" from section 276(a) seems particularly inappropriate here because the references to intrastate services appear in a portion of the statute specifying measures to implement section 276(a)'s general prohibitions on BOC subsidies and discrimination. *Cf. Clay v. United States*, 537 U.S. 522, 123 S.Ct. 1072, 1078, 155 L.Ed.2d 88 (2003) ("An unqualified term[,] ... *Russello* indicates, calls for a reading surely no less broad than a pinpointed one...."). If Congress had meant to prohibit only interstate subsidies and discrimination, it is difficult to understand why it would have directed the Commission to regulate *intrastate* call compensation and *intrastate* payphone subsidies.

The statute's structure and purpose also support the Commission's assertion of jurisdiction. Much like the 1996 Telecommunications Act's local competition provisions, section 276(a)'s command that BOCs shall neither subsidize nor discriminate in favor of their own payphone service, 47 U.S.C. § 276(a), is designed to replace a state-regulated monopoly system with a federally facilitated, competitive market. Observing that limiting Commission jurisdiction to interstate matters "would utterly nullify the 1996 amendments," the Supreme Court in *Iowa Utilities Board* affirmed the Commission's authority to "design a pricing methodology" to bind state rate-making commissions in implementing the Act's local competition provisions. 525 U.S. at 380, 385, 119 S.Ct. at 730-31, 733. Rejecting a section 152(b) challenge to the Commission's jurisdiction, the Court noted that "[a]fter the 1996 Act, § 152(b) may have less practical effect.... because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control." *Id.* at 381 n. 8, 119 S.Ct. at

731 n. 8.

Of course, unlike *Iowa Utilities Board,* which involved purely local, intrastate facilities and services, both intrastate and interstate facilities and services are at issue here. But in passing the 1996 Act's payphone competition provision and the local competition provisions, Congress had exactly the same objective: to authorize the Commission to eliminate barriers to competition. And much as the Supreme Court concluded it would be impossible to implement the local competition provisions while limiting the Commission's authority to interstate services, so would it make little sense for Congress to command the Commission to promulgate rules opening the payphone market to competition while leaving it powerless to address intrastate subsidies and discrimination, which are, after all, no less an obstacle to fair competition than interstate subsidies and discrimination.

The BOC petitioners next contend that even if section 276(a) bars intrastate discrimination, it does not authorize the Commission to prescribe any particular rate-making methodology. According to the BOCs, discrimination consists only of charging unlike prices for like services, and section 276's anti-discrimination command therefore requires only pricing parity. The BOCs argue that the Commission itself took this position in *Computer III* when it declined to mandate any particular pricing standard for enhanced services, choosing instead to require BOCs to allow competitors to use basic network services on the same terms as the BOCs themselves used those services. *See* *78 In the Matters of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1052 ¶¶ 183-184, 1986 WL 292006 (1986) (Report and Order). But the Commission has revised this position. Indeed, the new services test was an outgrowth of the Commission's recognition that pricing parity alone would still permit BOCs

to discriminate by "set[ting] relatively low rates for the [basic service elements] that they use, while pricing those that they do not need at relatively high rates." In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 F.C.C.R. 3983, 3985 ¶ 18, 1989 WL 512039 (1989) (Notice of Proposed Rulemaking); *see also Access Charge Subelements Order*, 6 F.C.C.R. at 4531 ¶¶ 38-44. Nothing in the statute indicates that Congress understood the word "discrimination" to carry the narrow meaning the BOCs urge, as opposed to the more expansive view the Commission adopted in its refinements to the *Computer III* regime.

Approaching the *Wisconsin Order* from the opposite angle, the PSP petitioners contend that section 276 confers on the Commission not only the authority to regulate BOCs' intrastate payphone line rates, but also the authority to extend its regulations to non-BOC LECs. For support, the PSPs rely primarily on the statute's purposes, contending that non-BOC LEC discrimination against competitors represents no less an obstacle to fair competition in the payphone industry than BOC discrimination. Though the PSPs may be correct as a matter of policy, the fact remains that sections 276(a) and 276(b)(1)(C), the sources of the Commission's authority to regulate intrastate payphone rates, expressly apply only to the BOCs. We must presume that when Congress referred to "Bell operating companies" rather than "local exchange carriers," it acted deliberately. Indeed, the Act defines the terms differently. 47 U.S.C. § 153(4), (26). The PSPs have, moreover, fallen short of demonstrating that this is one of the " 'rare cases' " in which we may look beyond clear statutory text to discern the statute's meaning because " 'literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir.2001) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1030-31, 103

L.Ed.2d 290 (1989)); *see also id.* (a party seeking to "rebut[ ] the presumption created by clear language ... must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it") (internal quotation marks and citation omitted).

The PSPs argue that even if section 276 does not confer on the Commission the requisite authority, the Commission may invoke other statutory provisions—specifically, section 201(b), the Communications Act's general rulemaking provision, section 202(a), the Act's antidiscrimination provision, and section 205(a), which authorizes the Commission to prescribe just and reasonable charges. 47 U.S.C. §§ 201(b), 202(a), 205(a). Such general provisions cannot, however, trump section 152(b)'s specific command that no Commission regulations shall preempt state regulations unless Congress expressly so indicates. *See Iowa Utils. Bd.*, 525 U.S. at 381 n. 8, 119 S.Ct. at 731 n. 8 ("Insofar as Congress has remained silent ... § 152(b) continues to function."). Absent authorization to apply its section 276 regulations to non-BOC LECs, the Commission may not regulate their intrastate payphone line rates.

IV.

Finally, the BOCs argue that the Commission acted arbitrarily and capriciously by imposing a forward-looking cost-based methodology for basic transmission rates. Specifically, the BOCs claim that (1) pricing *79 under the new services test is not rationally related to the statute's goal of preventing discrimination; (2) the *Order* is inconsistent with *Computer III*, in which the Commission did not alter the basic line rate; and (3) the Commission has not applied a forward-looking cost-based methodology to federal subscriber line charges, which, according to the BOCs, are analogous to payphone line rates.

The Commission objects to our consideration of these arguments on the ground that it "has been afforded no opportunity to pass" on them. 47 U.S.C. § 405(a)(2). The BOCs point out that they did in fact raise all of these arguments before the Commission, but they neglect to mention that they made each argument in the course of challenging the Commission's authority to set intrastate payphone line rates and never presented the type of substantive challenge they make here.

Because the BOCs failed explicitly to make a substantive challenge, "we must determine whether 'a reasonable Commission *necessarily* would have seen the question raised before [the Court] as part of the case presented to it.' "*AT&T Corp. v. FCC*, 317 F.3d 227, 235 (D.C. Cir.2003) (citation omitted) (emphasis in original). In considering this question, we "bear[ ] in mind that ... a litigant before the Commission ... ha[s] 'at least a modicum of responsibility for flagging the relevant issues.'" *Id.* (citation omitted). Claiming at oral argument that the BOCs did "flag" the issue, counsel pointed to a single sentence in a letter to the Commission regarding its jurisdiction, which stated that imposing a rule different from the rules that apply to federal subscriber line charges "would not only be beyond the Commission's jurisdiction, it would be arbitrary and capricious." Letter from Aaron M. Panner, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Magalie Salas, Secretary, Federal Communications Commission (Jan. 22, 2002). This was insufficient. Given that the BOCs' three arguments were focused on the Commission's jurisdiction, and given that the phrase "arbitrary and capricious" appears just once in the middle of a letter otherwise wholly dedicated to the BOCs' jurisdictional argument, "we cannot say that a reasonable Commission 'necessarily would have seen'" that the BOCs were questioning not only the Commission's authority to

promulgate rules regulating intrastate payphone line rates, but also the reasonableness of those rules. *AT&T*, 317 F.3d at 236 (citation omitted). Nor did any statement in an ex parte filing entitled "An Analysis of the Scope of Commission Jurisdiction Over Intrastate Payphone Line Rates" (filed Oct. 15, 2001), which counsel also identified as "flagging" the issue, necessarily put the Commission on notice of the BOCs' substantive challenge. As we have repeatedly held, "[t]he Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner." *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir.1997) (citation omitted). The BOCs should have filed a petition for reconsideration to afford the Commission an opportunity to pass on their arguments before they turned to this court for review. *See* 47 U.S.C. § 405(a)(2) (requiring a litigant first to present an argument to the Commission on reconsideration if it "relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass").

V.

We deny the petitions for review and affirm the *Wisconsin Order* in all respects.

So ordered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Wisconsin Public Service	)	
Commission	)	Bureau/CPD No. 00-01
	)	
Order Directing Filings	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 2002 Released: January 31, 2002

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (*Order*), we grant the LEC Coalition's[1] application for review of the Bureau's

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[1] The members of the LEC Coalition (Coalition) are: Ameritech Corporation, the Bell Atlantic companies (Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, and New England Telephone and Telegraph Company), BellSouth Telecommunications, Inc., GTE Service Corporation, SBC Telecommunications, Inc., Wisconsin Bell (d/b/a Ameritech Wisconsin), and U S WEST Communications, Inc. (now Qwest Corporation). The LEC Coalition's Application for Review of the Common Carrier Bureau's "New Services Test" Order at 1 n.1 (April 3, 2000) (LEC App.).

March 2, 2000 Order[2] (*Bureau Order*) that directed the four largest LECs in Wisconsin[3] to submit to the Federal Communications Commission (Commission) their currently effective tariffs for intrastate payphone service offerings. The *Bureau Order* stated that we would review the Wisconsin LECs' intrastate payphone service offerings for compliance with section 276 of the Communications Act of 1934, as amended (the Act),[4] and our rules, including the *Payphone Orders*.[5] While we do agree to review the LEC Coalition's application for review, we deny the Coalition's request to withdraw or stay the *Bureau Order*.[6]

2. After careful review of section 276 and its legislative

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[2] *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978 (March 2, 2000).

[3] Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), Century Telephone Enterprises, Inc., GTE North Incorporated, and Telephone Data Systems, Inc. (collectively, the Wisconsin LECs).

[4] 47 U.S.C. §§ 151-614.

[5] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*), Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), *aff'd in part and remanded in part, Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (*Second Payphone Order*), *vacated and remanded, MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), *aff'd, American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.

[6] LEC App. at 1-2.

history, we conclude that Congress enacted section 276 to "promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public."[7] To advance these pro-competitive statutory goals, Congress directed the Commission to "terminat[e] the current system of payphone regulation" and "eliminate *all* discrimination between [Bell Operating Company (BOC)] and independent payphones and all subsidies or cost recovery for BOC payphones."[8] In compliance with this statutory mandate, we affirm the Bureau's conclusion that section 276 requires BOCs to set their intrastate payphone line rates in compliance with the Commission's cost-based, forward-looking "new services" test.[9]

Although the administrative record for this matter shows disparate applications of the new services test in various state proceedings,[10] we believe that this *Order* will assist states in

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[7] 47 U.S.C. § 276(b).

[8] H.R. Rep. No. 104-204, at 88 (1995) (emphasis added).

[9] *Payphone Reconsideration Order*, 11 FCC Rcd at 20614, para. 146. *See also infra* note 26 and accompanying text.

[10] State payphone association filings in this proceeding, and related proceedings before this Commission, have described diverse state public service commission approaches to the requirements of the *Payphone Orders* in more than a dozen states. *See* Reply Comments of the Ind. Payphone Ass'n (Oct. 23, 2000); Reply Comments of the Midwest Independent Coin Payphone Ass'n (Oct. 23, 2000) (discussing Missouri Public Service Commission proceedings); Reply Comments of the Independent Payphone Ass'n of N.Y., Inc. (Oct. 23, 2000); Reply Comments of the Northwest Payphone Ass'n (discussing Oregon Public Utility Commission proceedings); Joint Reply Comments of Atl. Payphone Ass'n and Central Atl. Payphone Ass'n (filed Oct. 23, 2000) (discussing proceedings in Maryland, Virginia, and Washington, DC); Reply Comments of the Illinois

applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276.

3. Payphones are an important part of the nation's telecommunications system. They are critical not only for emergency communications, but also for those Americans who cannot afford their own telephone service.[11] Thus, despite evidence that payphones are losing market share to wireless services,[12] the basic pay telephone remains a vital telecommunications link for many Americans.

Pub. Telecomms. Ass'n, Michigan Pay Tele. Ass'n, Payphone Ass'n of Ohio, and the Kentucky Payphone Ass'n (filed Oct. 23, 2000). *See also* North Carolina Payphone Ass'n, Petition for Expedited Review, File No. CCB/CPD No. 99-27 (filed Aug. 13, 1999); Michigan Pay Tele. Ass'n, Petition for Declaratory Ruling, File No. CCB/CPD No. 99-35 (filed Nov. 12, 1999). *See also* Public Serv. Comm'n of S.C., *In re Request of BellSouth Telecommunications, Inc. for Approval of Revisions to its General Subscriber Service Tariff and Access Service Tariff to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Docket No. 97-124-C, Order Setting Rates for Payphone Lines and Associated Features, Order No. 1999-285 (April 19, 1999), *reconsideration denied*, Order No. 1999-497 (July 19, 1999); Tennessee Regulatory Auth., *In re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Docket No. 97-00409, Interim Order (Feb. 1, 2001).

[11] *See* Liza Mundy, *Hearing the Call*, The Wash. Post Magazine, Sept. 2, 2001, at 26. *See also* Raymond McCaffrey, *For the Phone Booth, It's Last Call*, The Wash. Post, Sept. 17, 2001, at B3.

[12] *Hearing the Call, supra* note 11, at 12, 25. We find nothing in section 276 that would authorize intervention into competitive issues as between the wireless and payphone services markets. Nevertheless, we acknowledge the concerns expressed in many letters to Congress and the Commission about competition from wireless services.

II. BACKGROUND

A. OVERVIEW OF SECTION 276

4. Before addressing the *Bureau Order*, we summarize the applicable statutory and regulatory provisions. We also review the *Payphone Orders*, other Commission orders, and the procedural history of this matter.

5. *The Requirements of Section 276.* Section 276(a) prohibits any BOC from: (1) subsidizing "its payphone service directly or indirectly from its telephone exchange operations or its exchange access operations;" and (2) preferring or discriminating "in favor of its payphone service" after the effective date of rules prescribed under section 276(b).

6. Section 276(b)(1) requires the Commission to prescribe regulations to "promote competition among payphone service providers and promote the widespread deployment of payphone services for the benefit of the general public."[13] The statute sets out five requirements to meet these goals. First, section 276(b)(1)(A) requires the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." Second, under section 276(b)(1)(B), the Commission must promulgate regulations that "discontinue the intrastate and interstate carrier access charge payphone service elements and payments . . . and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues." Third, section 276(b)(1)(C) directs the Commission to "prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subparagraph (a), which safeguards

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[13] 47 U.S.C. § 276(b)(1).

shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding."[14] Fourth, pursuant to section 276(b)(1)(D), the Commission shall "provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones." Finally, section 276(b)(1)(E) directs the Commission to "provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones."

7. *Preemption.* Section 276(c) states that, "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

8. *Definition of "Payphone Service."* Section 276(d) broadly defines the term "payphone service" as the "provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services."

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[14] *See In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec. 20, 1991) (*Computer III*).

B. THE *PAYPHONE ORDERS* AND RELATED COURT CHALLENGES

9. *The First Payphone Order.* We addressed the statutory requirements of section 276(b)(1) in the *First Payphone Order.*[15] To implement section 276(b)(1)(A)'s "fair compensation" plan requirements, we directed interexchange carriers (IXCs) that carry calls originating from payphones to compensate the payphone service provider (PSP).[16] Previously, PSPs received no revenue for originating certain calls (such as subscriber 800 and other toll-free number calls) and were prohibited from blocking callers from making some of those calls (such as access code calls).[17] We concluded that PSPs must be compensated for all such calls and determined that IXCs, as the primary beneficiaries of those calls, should be responsible for providing that compensation.[18]

10. We decided that the best way to ensure fair competition was to allow the market to set the price for each call.[19] Because no market existed for so-called "dial around" coinless calls, we first adopted a market-based surrogate – the price of a local coin call at a typical deregulated payphone of $0.35. In selecting this regime, we stated that "the cost[s] of

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[15] *First Payphone Order,* 11 FCC Rcd at 20543-45, paras. 1-8.

[16] *Id.* at 20566, para. 48.

[17] *In the Matter of Bell Atlantic-Dela. v. Frontier Comms. Servs., Inc.,* No. E-9848/49, Mem. Opinion and Order, 14 FCC Rcd 16050, 16053-54, para. 5 (Sept. 24, 1999).

[18] *Id.; First Payphone Order,* 11 FCC Rcd at 20584, para. 83.

[19] *First Payphone Order,* 11 FCC Rcd at 20577, para. 70.

originating the various types of payphone calls are similar."[20]

11. To discontinue access charges and subsidies under section 276(b)(1)(B), we concluded that, in order to receive compensation for completed calls originating from its payphones, a LEC PSP "must be able to certify" that it has complied with several requirements, including the institution of "effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate [payphone] subsidies."[21] We also required that all incumbent LEC payphones be treated as deregulated and detariffed customer premises equipment (CPE).[22]

12. To implement the nonstructural safeguards requirement of section 276(b)(1)(C), we stated that all BOCs must comply with the nonstructural safeguards from our *Computer III* order.[23] We stated that such safeguards will "ensure that BOCs do not discriminate or cross-subsidize in their provision of payphone service."[24] We concluded that, to comply with *Computer III*, LECs must unbundle payphone line services and file tariffs with the Commission for such services using the price cap "new services" test.[25] The new services test is a cost-based test that sets the direct cost of providing the new service as a price floor and then adds a reasonable

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[20] *Id.*

[21] *Payphone Reconsideration Order*, 11 FCC Rcd at 21293, para. 131 (summarizing certification requirements).

[22] *First Payphone Order*, 11 FCC Rcd at 20611, para. 142.

[23] *Id.* at 20640-41, paras. 199-200. *See supra* note 14.

[24] *Id.* at 20640, para. 199.

[25] *Id.* at 20614, para. 146.

amount of overhead to derive the overall price of the new service.[26] The Commission has applied this test to new interstate access service proposed by LECs subject to price cap regulation.[27]

13. Finally, subsections 276(b)(1)(D) and (E) concern the ability of BOCs and independent PSPs to negotiate with location providers on the selection of presubscribed interLATA and intraLATA carriers, respectively.[28] In the *First Payphone Order*, we identified certain "market-distorting factors" affecting these negotiation rights, such as conflicting state rules and discriminatory access, but we stated that the nonstructural safeguards in *Computer III* would address our concerns.[29] Pursuant to the express authority provided under Section 276(c), we also preempted any intrastate rules that limited or affected these negotiation rights.[30]

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[26] *See Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (July 11, 1991) (*Part 69/ONA Order*); *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, Mem. Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 340-47, paras. 209-22 (Nov. 7, 1994) (defining new services test) (*Video Dialtone Reconsideration Order*).

[27] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986).

[28] *First Payphone Order*, 11 FCC Rcd at 20644, para. 208, and 20667, para. 253.

[29] *Id.* at 20644, para. 208, and 20660, para. 238.

[30] *Id.* at 20669-70, para. 261.

14. *The Reconsideration Order*. Acting on several petitions for reconsideration, we modified certain requirements for LEC tariffing of payphone services and unbundled network functionalities. We stated that LECs should file tariffs for basic payphone lines at the state level only. Unbundled features and functions provided by LECs to their own payphone operations or to others should be tariffed at both the state and federal levels.[31] We confirmed that, even if LEC payphone tariffs were filed at the state level, they should nevertheless comply with section 276 as implemented by the Commission and, as such, should be cost-based, nondiscriminatory, and consistent with both section 276 and our *Computer III* tariffing guidelines.[32] Thus, rates assessed by LECs for payphone services tariffed at the state level should satisfy the new services test.

15. In the interest of federal-state comity, we stated that we would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.[33] We noted, however, that state commissions that are unable to review these tariffs may ask incumbent LECs operating in their states to file such tariffs with the Commission.[34] We also preempted all state rules that were inconsistent with our nonstructural safeguards.[35]

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[31] *Payphone Reconsideration Order*, 11 FCC Rcd at 21307-09, paras. 162-65.

[32] *Id.* at 21308, para. 163.

[33] *See* Letter to Joseph P. Mettner, Chairman, Public Service Commission of Wisconsin, from Kathryn C. Brown, Chief, Common Carrier Bureau, 13 FCC Rcd 20865, 20866 (Oct. 28, 1998) (1998 CCB Letter).

[34] *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

[35] *Id.* at 21328-29, paras. 218-220.

16. *Illinois Public Telecommunications Association v. FCC.* Various parties sought review of several portions of the *Payphone Orders.*[36] As an initial matter, the D.C. Circuit held that the Commission has jurisdiction to set purely intrastate local coin rates for payphones as part of a compensation plan under section 276(b)(1)(A).[37] The court also upheld those portions of the two challenged orders that deregulated local coin rates for payphones, set such rates according to the market, established a "carrier pays" compensation plan for toll-free payphone calls, and required IXCs to track calls from payphones.[38] The court remanded the coinless call rate determination to us, however, stating that we had overlooked record evidence that the costs of coin calls and coinless calls are not similar.[39]

17. *MCI Telecommunications Corp. v. FCC.* On remand, we re-calculated the coinless call rate using a "top down" methodology.[40] Several parties challenged portions of the *Second Payphone Order* in the D.C. Circuit.[41] The court invalidated the Commission's methodology for calculating the local coinless call rate and remanded the order for further proceedings.

18. *American Public Communications Counsel v. FCC.* On

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[36] *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (*IPTA v. FCC*).

[37] *Id.* at 562.

[38] *Id.* at 562-67.

[39] *Id.* at 563-64.

[40] *Payphone Reconsideration Order*, 11 FCC Rcd 21233.

[41] *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998).

remand, the Commission developed and applied a "bottom up" methodology to calculate the local coinless call rate.[42] The D.C. Circuit upheld the Commission's order, finding that the bottom up methodology was a reasonable exercise of the Commission's authority to establish per-call compensation rates.[43]

C. PROCEDURAL HISTORY OF THIS MATTER

19. In July 1997, the Wisconsin Pay Telephone Association filed a petition with the Wisconsin Commission "request[ing] that the [Wisconsin Commission] determine the cost basis for each network service provided by Wisconsin [LECs] to payphone providers under the federal New Services Test, determine whether the network services provided by LECs to payphone providers discriminate in favor of the LECs' own payphone operations, [and] determine whether LECs are subsidizing payphone operations with revenue from noncompetitive services."[44]

20. Four months later, in November 1997, one month after the D.C. Circuit remanded the *Second Payphone Order* to the Commission, the Wisconsin Commission held that its ability to investigate the rates charged by LECs to payphone service providers "is very narrowly circumscribed to enforcing a prohibition on cross subsidy . . . and discriminatory

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[42] *Third Payphone Order*, 14 FCC Rcd at 2577, para. 72.

[43] *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000). Neither the top down nor bottom up methodology is at issue in this proceeding, but we include this discussion to provide context.

[44] Wisconsin Public Service Commission Letter Order, Docket No. 05-TI-156 (Nov. 6, 1997) (unpublished).

practices."[45] The Wisconsin Commission also stated that the statutory remedies available under Wisconsin law "only address whether the retail rates charged by telecommunications utilities for competitive telecommunications service recover the underlying cost for that service."[46] The Wisconsin Commission concluded that it could not review the rates, terms, and conditions of basic payphone services for compliance with the requirements of section 276 and the Commission's rules.[47]

21. On October 28, 1998, the Bureau sent a letter to the Wisconsin Commission stating that, in light of the Wisconsin Commission's decision, the Bureau would require the Wisconsin LECs to file with the Commission "tariffs that set forth the rates, terms, and conditions associated with pay phone services, along with the required supporting documentation."[48] The Bureau stated that its review of such rates would ensure that LEC payphone line service tariffs in Wisconsin complied with section 276 and the *Payphone Orders*.[49]

22. On March 2, 2000, the Bureau issued an order directing Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), GTE North Incorporated, Century Telephone Enterprises Inc., and Telephone Data Systems, Inc., to submit to the Commission copies of their companies' currently effective intrastate tariffs

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* 1998 CCB Letter, 13 FCC Rcd at 20866.

[49] *Id.*

that set forth the rates, terms, and conditions associated with payphone line services in Wisconsin.[50] The *Bureau Order* also requested documentation demonstrating compliance with the requirements of section 276 and the Commission's rules.[51]

1. Cost-Based Federal Pricing Standards

23. The *Bureau Order* summarized the guidelines to be applied under *Computer III* and other Commission proceedings concerning the application of the new services test and cost-based ratemaking principles to services that incumbent LECs offer to competitors.[52] The Bureau explained that, to satisfy these requirements, an incumbent LEC must demonstrate that the proposed payphone line rates do not recover more than the direct costs of the service, plus "a just and reasonable portion of the carrier's overhead costs."[53] Costs must be determined by an appropriate forward-looking, economic cost methodology that is consistent with the principles articulated in the *Local Competition Order*[54]

24. The *Bureau Order* confirmed our longstanding policy that the new services test requires the use of consistent methodologies in computing direct costs for related services.[55]

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[50] *Bureau Order*, 15 FCC Rcd at 9980, para. 5.

[51] *Id.*

[52] *Id.* at 9981-82, paras. 7-12.

[53] *Id.* at 9981, para. 9.

[54] *Id. See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 9698, First Report and Order, 11 FCC Rcd 15499 (Aug. 8, 1996) (*Local Competition Order*).

[55] *Bureau Order*, 15 FCC Rcd at 9981-82, para. 10.

As a result, the *Bureau Order* stated, cost study inputs and assumptions used to justify payphone line rates should be consistent with the cost inputs used in computing rates for comparable services offered to competitors.[56]

2. Just and Reasonable Overhead Allocations

25. The *Bureau Order* stated that overhead allocations must be based on cost and may not be set artificially high in order to subsidize or contribute to other services.[57] The *Bureau Order* required the Wisconsin LECs to justify the methodology used to determine such overhead costs.[58] Absent justification, the *Bureau Order* stated, the Wisconsin LECs may not recover a greater share of overheads in rates for the service under review than they recover for comparable services.[59] The Bureau concluded that, for purposes of justifying overhead allocations, unbundled network elements (UNEs) appear to be "comparable" to payphone line services because both provide critical network functions to a BOC's competitors and are subject to a "cost-based" pricing requirement.[60] The Bureau stated its expectation that the Wisconsin LECs should explain any overhead allocations for payphone line services that depart significantly from overhead allocations approved for UNE services.[61]

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[56] *Id.* at 9982, para. 10.

[57] *Id.* at 9982, para. 11. *See Computer III*, 6 FCC Rcd at 7601, para. 64 n.108; *Part 69/ONA Order*, 6 FCC Rcd at 4532, para. 46.

[58] *Bureau Order*, 15 FCC Rcd at 9982, para. 11.

[59] *Id.*

[60] *Id.*

[61] *Id.*

26. Finally, the *Bureau Order* stated that any forward-looking cost studies required for an overhead allocation demonstration should produce cost estimates on an "unseparated" basis.[62] The *Bureau Order* explained that, to avoid double recovery of costs, the BOC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (*e.g.*, subscriber line charges (SLC), presubscribed interexchange carrier charges (PICC), and carrier common line (CCL) charges).[63]

27. The *Bureau Order* required that copies of tariffs and supporting documentation be filed by May 12, 2000.[64] On April 3, 2000, the LEC Coalition filed an application for review and request for stay of the Order. On April 10, 2000, the American Public Communications Council (APCC) and the Wisconsin Pay Telephone Association (WPTA) filed oppositions to the LEC Coalition's request for stay. On April 12, 2000, the Bureau, on its own initiative, deferred the date for the filings required by the *Bureau Order* until August 12, 2000, and issued a public notice requesting comment on the LEC Coalition's request for stay and application for review.[65] Oppositions to the request for stay and application for review were filed by APCC, WPTA, and several other state payphone associations on May 12, 2000. The LEC Coalition replied on May 30, 2000. On August 12, 2000, the Wisconsin LECs filed their tariff submissions pursuant to the March 2 Order. We requested comments and reply comments on those

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[62] *Id.* at 9982, para. 12.

[63] *Id.*

[64] *Id.* at 9982, para. 13.

[65] *FCC Public Notice: Pleading Cycle Established for CCB/CPD No. 00-01*, 15 FCC Rcd 6238, 6238 (April 12, 2000).

submissions, which were filed on October 2, 2000 and October 23, 2000, respectively.

28. The LEC Coalition argues that our application of the new services test to intrastate payphone line rates is improper.[66] The Coalition states that the new services test is flexible and need not be based on forward-looking costs.[67] The LEC Coalition also contends that the pricing regime of sections 251 and 252 does not apply to payphone services.[68] The Coalition states that overhead loading rates should not be based on those for UNEs.[69] Finally, the LEC Coalition argues that the Commission lacked the jurisdiction under section 276 to issue the *Bureau Order* in the first place and that, in any event, it violates the Tenth Amendment.[70]

29. APCC and other payphone associations counter that we properly asserted jurisdiction in the *Payphone Orders* and in the *Bureau Order*.[71] They argue that we cannot possibly fulfill Congress' directive to prevent the BOCs from discriminating against other PSPs if the underlying payphone

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[66] LEC App. at 5-7.

[67] *Id.* at 10.

[68] *Id.* at 11.

[69] *Id.*

[70] *Id.* at 20-22. Although the LEC Coalition did not challenge our jurisdiction to issue the *Payphone Orders*, *see infra* note 74, we believe that, by challenging the jurisdictional basis of the *Bureau Order* concerning federal review of intrastate payphone line rates, the LEC Coalition necessarily challenges those portions of the *Payphone Orders* on which the *Bureau Order* relies.

[71] Letter from A.H. Kramer and R.F. Aldrich, counsel for APCC, to Dorothy Attwood, Chief, Common Carrier Bureau (March 20, 2001).

line rate is not subject to a cost-based standard such as the new services test.[72]

30. Before turning to the merits of the LEC Coalition's arguments concerning pricing and related issues from the *Bureau Order*, we first address the claim that the Commission lacks jurisdiction to require BOCs to set their intrastate payphone line rates in compliance with the new services test.[73]

III. DISCUSSION

A. INTRASTATE JURISDICTION UNDER SECTION 276

31. The threshold question before the Commission is whether we have the authority to set the standard that states must apply in reviewing payphone line rate tariffs. Because these rates have been considered intrastate rates and thus traditionally handled by the states, the central issue is whether

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[72] *Id.*

[73] The LEC Coalition also makes three other arguments. First, it alleges that the *Bureau Order* violates the Bureau's delegated authority under 47 C.F.R. § 0.291(a)(2) as a "novel" assertion of federal power "without precedent." LEC App. at 10. As the discussion below shows, however, the *Bureau Order* adheres to the commands of section 276 and also is consistent with our prior orders concerning pricing and payphones. Accordingly, we conclude that the *Bureau Order* was within the Bureau's delegated authority. Second, the Coalition claims that the *Bureau Order* is a "legislative rule" that must go through notice and comment. *Id.* at 10. We disagree. The *Bureau Order* simply applies our existing authority. In any event, many parties, including the LEC Coalition and APCC, have submitted thorough *ex parte* comments on the jurisdictional issue. Finally, the Coalition contends that the *Bureau Order* violates the Tenth Amendment by "dictat[ing] the content of state law." *Id.* at 21. Section 276 simply sets a federal standard, and the Supreme Court has repeatedly validated "Congress' power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992) (citations omitted). *See also FERC v. Mississippi*, 456 U.S. 742, 759 (1982).

the Commission has jurisdiction over the intrastate component of payphone line rates. In the *First Payphone Order*, we asserted such authority and ordered that all LEC payphone line rates be cost-based, as measured by the new services test. Four years after the Commission first asserted jurisdiction over intrastate payphone line rates, the LEC Coalition now challenges our authority over intrastate payphone line rates.[74] For the reasons set forth below, we confirm the holding of our previous orders that we have jurisdiction over the intrastate payphone line rates charged by BOCs, but also hold that we do not have jurisdiction over such rates charged by non-BOC LECs. Nevertheless, as discussed below, states may find it appropriate to apply to all LECs the same cost-based requirement that they must apply to BOCs.

32. We must determine whether Congress through section 276 has granted us authority to regulate this traditionally intrastate matter. Our interpretation of section 276 is guided by section 2(b), which states that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to" intrastate services.[75] As a result of that interpretive rule, the Commission may regulate intrastate services when

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[74] This new challenge is inconsistent with position taken by the BOC coalition in 1997, when it sought and obtained a 45-day waiver for compliance with the new services test, acknowledging in the process that the Commission *does* in fact have jurisdiction over intrastate payphone services *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, 12 FCC Rcd 21370, 21375-76, paras. 13-14 (April 15, 1997). The Commission noted that the "RBOC Coalition *concedes* that the Commission's payphone orders . . . mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states." *Id.* at 21378, para. 18 (emphasis added).

[75] 47 U.S.C. § 152(b).

Congress has conferred intrastate jurisdiction in a manner that is "unambiguous or straightforward."[76] Thus, we will examine section 276 to determine whether it constitutes such a grant of authority.

33. We begin with the terms of the statute. Sections 276(a)(1) and (2) provide that any BOC that provides payphone service "shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations" and that a BOC "shall not prefer or discriminate in favor of its payphone service."[77] Those prohibitions necessarily apply to both intra- and interstate payphone service provided by BOCs because the statutory language is unqualified and contains no limitation whatsoever on the discrimination, subsidies, and preferences that are prohibited. Congress would not have directed the elimination of subsidies and discrimination if BOCs were free to subsidize and discriminate at the intrastate level. To the extent that it is "not possible to separate the interstate and the intrastate components" of telephone regulation, the Commission may ensure effective regulation of the federal component, despite section 2(b), by asserting jurisdiction over the state component as well.[78]

34. Other provisions of section 276 support the conclusion that sections 276(a)(1) and (2) apply to intrastate service. In place of the subsidies that formerly supported the LEC-owned payphone system, Congress in section 276(b)(1)(A) substituted a "per call compensation plan" that applies to "each and every completed intrastate and interstate call." The D.C. Circuit

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[76] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986).

[77] 47 U.S.C. § 276(a)(1), (2).

[78] *Louisiana*, 476 U.S. at 375 n.4.

held in *IPTA v. FCC* that this provision gives the Commission authority to deregulate the price charged to payphone users, which like the line rate had long been the subject of state regulation.[79] The compensation plan's explicit application to intrastate matters significantly indicates that Congress also intended to reach intrastate subsidies when it forbade BOCs from subsidizing payphone operations in section 276(a)(1). Similarly, Congress effectuated the anti-subsidy policy of section 276(a) through section 276(b)(1)(B), which directs the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments . . . and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues." Thus, section 276(b)(1)(B) applies explicitly to both intrastate and interstate subsidies and by doing so strongly indicates that section 276(a)(1), the provision it effectuates, was also intended to apply to intrastate discrimination.[80]

35. In addition to individual provisions of the statute indicating Congress' intent that the non-subsidy provision (and by implication the non-discrimination provision) apply to both intra- and interstate service, the statutory language and structure as a whole demonstrate that Congress so intended. Section 276 establishes a comprehensive federal scheme of payphone regulation, both intra- and interstate, to be administered by the Commission. The statute eliminates

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[79] *IPTA v. FCC*, 117 F.3d 555. The Commission previously determined that payphone line rates are the greatest single cost associated with providing payphone service. *Third Payphone Order*, 14 FCC Rcd at 2623-25, paras. 170-74, and 2632, para. 191. *See also* APCC, "New Services Test Presentation," Tab 1 at 1 (July 19, 2001).

[80] Section 276(b)(1)(B) is somewhat broader than section 276(a)(1) because it applies to all LECs and is not limited to the BOCs, as is section 276(a)(1). That distinction explains why Congress included a separate directive to the Commission to eliminate subsidies.

the subsidies that supported the old system and implements in its place a new market-oriented approach. Four of the five specific regulatory directives in the statute, contained in subsections A, B, D, and E of section 276(b)(1), refer directly to intrastate regulation.[81] That focus on intrastate regulation alone indicates Congress' intent that the Commission occupy the field. This is not surprising. An overarching federal program is necessary to achieve Congress' goal of eliminating subsidies in order to "promote competition among payphone service providers and promote the widespread deployment of payphone services."[82] The importance of federal control is driven home by section 276(c), which expressly preempts "any State requirements . . . inconsistent with the Commission's regulations" implementing the statute. Such a comprehensive plan also shows that Congress intended the BOC non-discrimination and non-subsidization provisions to apply to all BOC payphone activity, both intra- and interstate.[83]

36. The legislative history of section 276 supports that interpretation of the statutory language. Congress intended to "terminat[e] the current system of payphone regulation"—*i.e.*, the subsidization and state regulation that had long prevailed—and to "eliminate *all* discrimination between BOC and independent payphones and *all* subsidies or cost recovery for BOC payphones from regulated interstate

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[81] Subsections D and E refer to intraLATA and interLATA services, which necessarily include intrastate service.

[82] § 276(b)(1).

[83] In that respect, section 276 is akin to section 251 in that it extends the Communications Act into an area previously controlled by the states. In those circumstances, the Supreme Court held, section 2(b) "may have less practical effect" than before Congress instituted a federal payphone policy. *AT&T Corp. v. Iowa Utils. Brd.*, 525 U.S. 366, 381 n.8 (1999).

or intrastate exchange or exchange access revenue."[84] The Senate Committee Report similarly recognizes that BOCs have the "incentive and the potential for *all* the forms of discrimination, cross-subsidy, and leveraging of bottleneck facilities that both the divestiture and the Commission's regulatory regime for competitive [BOC] offerings are supposed to prevent."[85] Thus, Congress' stated intention to eradicate all forms of discrimination was made manifest in the broad mandate of section 276(a) to eliminate all subsidies and discrimination, intra- or interstate.

37. Subsection 276(b)(1)(C) is the only sub-part of section 276(b)(1) that does not use the term "intrastate" or otherwise refer directly to such service. But subsection C directs the Commission to impose nonstructural safeguards on BOC payphone operations in order to "implement the provisions of paragraphs (1) and (2) of subsection (a)," *i.e.*, sections 276(a)(1) and (2). If section 276(a) applies to intrastate payphone services, as we have shown it does, then section 276(b)(1)(C) necessarily applies to intrastate services, especially in light of the comprehensive regulatory scheme intended by Congress.

38. The preemption provision of section 276(c) comes strongly into play here. That provision preempts "*any* State requirement" that is "inconsistent with the Commission's regulations" implemented pursuant to section 276(b)(1). Nonstructural safeguards implemented under subsection C would, of course, be implemented pursuant to section 276(b)(1) and would fall within the scope of the preemption provision. Thus, a federal policy that payphone line rates be cost-based would be binding on the states. But if sections

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[84] H.R. Rep. No. 104-204, at 88 (emphasis added).

[85] S. Rep. No. 104-23, at 57-58 (March 30, 1995) (emphasis added).

276(a) and (b)(1)(C) do not apply to intra- as well as interstate matters, our broad preemption authority would greatly exceed our jurisdiction to issue rules in the first place. We find no evidence that Congress intended us to implement such a fractured regime.

39. In reviewing our authority in the matter before us, Congress' directive in section 276(b)(1)(C) to implement, "at a minimum," *Computer III* safeguards requires that we direct the states to apply the cost-based new services test to the payphone line rate. In *Computer III* itself, the Commission "adopted a cost-based approach to the initial pricing of new ONA services" to prevent BOCs from discriminating against independent service providers.[86] *Computer III* is not the only Commission order in which we evaluated purely intrastate services for compliance with a federal pricing standard.

40. In the *Phase I ONA Order*, for example, the Commission extensively discussed federal jurisdiction over tariffs for the BOCs' intrastate ONA services.[87] The Commission stated that "unbundling and economical pricing are two hallmarks of an ideal tariff structure for ONA services."[88] The Commission reviewed, and ultimately approved, the fundamental intrastate tariff structures of many of the plans under review. The Commission did, however, require several BOCs to file amendments explaining their intrastate ONA pricing strategies.[89] These BOCs had not

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[86] *Computer III*, 6 FCC Rcd at 7601, para. 64 n.108. *See also Part 69/ONA Order*, 6 FCC Rcd at 4531, paras. 38-41.

[87] *Phase I ONA Order*, 4 FCC Rcd at 162-71, paras. 309-25.

[88] *Id.* at 164, para. 313.

[89] *Id.* at 166-67, paras. 316-17.

demonstrated that their intrastate ONA services were either cost-based or sufficiently unbundled, characteristics that we lauded in NYNEX's intrastate ONA services plan, for example.[90] We concluded that, "[i]f a BOC's ONA plan contains elements that are so inconsistent with ONA policies that they would jeopardize fulfillment of these goals, we cannot approve that plan."[91] We cautioned that, "[t]o do otherwise could create a discriminatory or inefficient environment for [providers] that rely on the BOC's ONA services."[92]

41. The LEC Coalition argues that the absence of the word "intrastate" from subsection C is evidence of Congress' intent that structural safeguards apply only to interstate services. The absence of that word means little in light of the clear overall thrust of the statute.[93] As the Supreme Court stated, "the mere lack of parallelism [in one subsection] is surely not enough to displace [the Commission's] explicit authority"

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[90] *Id.* at 166-67, para. 317.

[91] *Id.*

[92] *Id. See also Part 69/ONA Order*, 6 FCC Rcd at 4532, para. 45 ("ONA services do present an increased danger of unreasonable discrimination.").

[93] The LEC Coalition's argument that the absence of the word "intrastate" from section 276(b)(1)(C) is dispositive of the jurisdictional question cannot be squared with the Coalition's recent statement that the Commission's "authority with respect to the rates that BOCs charge for intrastate payphone services extends only to ensuring that the BOCs' state tariffs do not undermine the Commission's federal regulatory structure." Letter from Aaron M. Panner, counsel for LEC Coalition, to Magalie Salas, Secretary, FCC, at 6 (Oct. 15, 2001). That is, having conceded that the Commission has jurisdiction *at all* over intrastate payphone line rates – even if limited to ensuring compliance with federal standards – the LEC Coalition cannot also claim that the Commission's intrastate jurisdiction fails for want of a single word.

under another subsection.[94] In addition, the LEC Coalition's interpretation would "produce[] a most chopped-up statute" of the sort rejected in that case.[95] Further, as we have also discussed, section 276(b)(1)(C) itself implicitly applies to intrastate payphone service. The nonstructural safeguards called for by Congress must include, "at a minimum," the safeguards adopted in *Computer III*. In the course of the *Computer III* proceedings, we preempted various state regulations and asserted federal jurisdiction over a number of intrastate matters.[96]

42. In sum, we require that BOC payphone line rates be cost-based, in accordance with the standards we set forth below.[97] It is important to note that we require only BOCs, and not LECs generally, to provide payphone lines at cost-based rates. Because sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since there are statutory provisions that empower us to apply the new services test to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC

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[94] *Iowa Utils. Bd.*, 525 U.S. at 385.

[95] *Id.* at 381 n.8.

[96] *Computer III*, 6 FCC Rcd at 7625-37, paras. 110-131. *See supra* paras. 39-41.

[97] When the Commission's jurisdiction over intrastate services arises by implication, federal regulation of intrastate services must be as narrow as possible. *IPTA v. FCC*, 117 F.2d at 563. In this case, however, we have been given an express mandate to preempt state regulation of intrastate payphone line rates; therefore, our jurisdiction does not arise by implication, and it need not be narrowly construed. *Cf. id.*

line rates. Although the federal regulatory program implemented in section 276 would surely benefit if all LECs were required to use cost-based rates for their payphone line services, we cannot say that, with respect to non-BOC LECs, Congress has spoken with sufficient clarity to overcome the presumption of section 2(b). We do, however, encourage states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines.

B. PRICING STANDARDS FOR PAYPHONE SERVICES

1. Application of the New Services Test

43. The Commission previously concluded that rates for ONA services must satisfy the flexible, cost-based "new services test."[98] Contrary to the claims of the LEC Coalition,[99] the Commission's longstanding precedent shows that we have used forward-looking cost methodologies where we have applied the new services test.[100] Thus, the ONA safeguard from *Computer III* and section 276 requires that payphone service rates comply with the flexible, cost-based, forward-looking new services test. Consistent with the plain language of section 276(b)(1)(C), however, only BOC's intrastate

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[98] *Computer III*, 6 FCC Rcd at 7601, para. 64 n.108; *Part 69/ONA Order*, 6 FCC Rcd at 4531, paras. 38-41.

[99] LEC App. at 10.

[100] *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440, 454-55, paras. 36, 40, 41 (Dec. 15, 1993) (*ONA Tariff Order*); *Local Competition Order*, 11 FCC Rcd at 15911-12, paras. 825-26.

payphone services need satisfy the new services test.[101]

44. We note that many states have relied on our *Payphone Orders* and have diligently applied the new services test, as we directed, to intrastate payphone line rates.[102] We commend those states. Other states have been awaiting additional guidance from us on this issue.[103]

2. Use of TELRIC and TSLRIC

45. The LEC Coalition contends that the *Bureau Order* contains three primary substantive errors. The Coalition first asserts that payphone services are not new and therefore should not be subject to the new services test. The LEC Coalition also argues that the pricing regime of sections 251 and 252 does not apply to payphone services. Finally, the Coalition claims that the *Bureau Order* mandates the provision of payphone services using only the "total element long-run incremental cost" (TELRIC) pricing methodology.[104] We address these contentions below and conclude that they lack merit.

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[101] To the extent that the *Bureau Order* required application of the new services test to non-BOCs, we hereby vacate that conclusion.

[102] *E.g.*, Public Serv. Comm'n of Md., *In the Matter of the Inquiry into the Payphone Tariffs of Bell Atlantic-Md., Inc.*, Case No. 8763, Order No. 76787 (Feb. 27, 2001).

[103] *E.g.*, Letter from James Connelly, Chairman, Mass. Dept. of Telecomms. & Energy, to Michael K. Powell, Chairman, FCC (March 5, 2001) (requesting decision on whether new services test applies to intrastate payphone line rates).

[104] LEC App. at 12. *See also Local Competition Order*, 11 FCC Rcd at 15846, para. 679 (defining TELRIC); *AT&T Corp. v. FCC*, 220 F.3d 607, 615-16 (2000) (same); *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 340-47, paras. 209-22 (same).

46. The Coalition argues that payphone lines are not themselves a "new service" and that they are therefore exempted from the new services test requirement to use forward-looking costs.[105] Nothing in the *Payphone Orders* or section 276 supports this argument. In the *Payphone Orders*, the Commission adopted a new regulatory regime for payphone services, and we therefore required the application of the "new services" test to payphone line services, whether or not BOCs consider those services to be "new."

47. As we previously explained, "[b]ecause the incumbent LECs have used central office coin services in the past, but have not made these services available to independent [PSPs] for use in their provision of payphone services, we require that incumbent LECs' provision of payphone transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules."[106] We noted that the new services test is necessary to ensure that central office coin services are priced reasonably because "incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services."[107] We stated that, because we required "dumb" lines to be re-priced on the same basis as "smart " lines, existing dumb lines would also have to meet the new services test.[108]

48. Second, the Coalition states that the pricing regime set forth in sections 251 and 252 does not apply to all section 276

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[105] LEC Coalition's Reply in Support of Its Application for Review and Request for Stay at 7 (filed May 30, 2000) (LEC Reply).

[106] *First Payphone Order*, 11 FCC Rcd at 20614, para. 146.

[107] *Id.*

[108] *Id.*

payphone services offered by incumbent LECs.[109] We previously reached the same conclusion in the *First Payphone Order*.[110]

49. Finally, the LEC Coalition asserts that the *Bureau Order* mandates the exclusive use of the TELRIC pricing methodology and that this mandate is improper.[111] The *Bureau Order*, however, contains no such directive. Indeed, the *Bureau Order* states that the LECs should use a forward-looking methodology that is "consistent" with the *Local Competition Order*.[112] TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices.[113] States often use "total service long run incremental cost" (TSLRIC) methodology in setting rates for intrastate services. It is consistent with the *Local Competition Order* for a state to use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs.[114]

50. As such, we do not impose on payphone line services the sections 251 and 252 pricing regime for local interconnection services. For example, while we have prohibited LECs from including certain "retail" costs in their

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[109] LEC App. at 14-15.

[110] *See First Payphone Order*, 11 FCC Rcd at 20615, para. 147.

[111] LEC App. at 9.

[112] *Bureau Order*, 15 FCC Rcd at 9981, para. 9.

[113] *Local Competition Order*, 11 FCC Rcd at 15844-46, paras. 672-78.

[114] *Id.* at 15845-46, paras. 677-78.

prices for UNEs,[115] no such prohibition applies to payphone line services. If they wish, the LECs may include in their direct cost calculations those "retail" costs, such as marketing and billing costs, that they can show are attributable to payphone line services.

C. OVERHEAD ALLOCATION AND LOADING FACTORS

51. With respect to overhead loading factors, the *Bureau Order* states that:

> the LECs must justify the methodology used to determine [payphone service] overhead costs. Absent justification, LECs may not recover a greater share of overheads in rates for the service under review than they recover in rates for comparable services. Given that the new services test is a cost-based test, overhead allocations must be based on costs, and therefore may not be set artificially high in order to subsidize or contribute to other LEC services. For purposes of justifying overhead allocations, UNEs appear to be "comparable services" to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a "cost-based" pricing requirement. Thus, we expect incumbent LECs to explain any overhead allocations for their payphone line services that represent a significant departure from overhead allocations approved

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[115] *Id.* at 15851, para. 691.

for UNE services.[116]

52. The *Bureau Order* correctly states our policy that our pricing requirements do not mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified.[117] As the above quotation shows, the Bureau approved the use of UNE loading factors to determine an appropriate overhead allocation for payphone services. We agree with the Bureau that UNE overhead loadings may be used in this manner, and states that have used this methodology are in full compliance with section 276 and our *Payphone Orders*. We do not agree, however, with the Bureau that UNE overhead loadings must serve as a default ceiling. There are other approaches that are also consistent with our precedent regarding overhead assignments to new services provided to competitors.

53. In the *Physical Collocation Tariff Order*,[118] we stated that, to calculate the appropriate overhead loading, the incumbent LECs must (1) compute the direct costs of providing the DS-1 and DS-3 services that compete with the services offered by collocated competitors; and (2) subtract those costs from the lowest rates charged for those services, taking into account all

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[116] *Bureau Order*, 15 FCC Rcd at 9982, para. 11.

[117] *In the Matter of Local Exchange Carriers' Payphone Functions and Features*, CC Docket No. 97-140, Mem. Opinion and Order, 12 FCC Rcd 17996, 18002, para. 13 (Oct. 29, 1997) (*Payphone Features Order*); *Part 69/ONA Order*, 6 FCC Rcd at 4531, para. 44.

[118] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (June 13, 1997) (*Physical Collocation Tariff Order*).

volume and term discounts.[119] The difference between the retail rates and the direct costs represents the contribution to overhead from these competitive services.[120] The Commission then prescribed overhead loading factors for each LEC's expanded interconnection services that did not exceed the lowest overhead loading resulting from the calculation described above.[121] By limiting the overheads applicable to expanded interconnection rates to the lowest overheads applied by LECs to competitive services, the Commission sought to prevent the incumbent LECs from disadvantaging competitors.[122]

54. We have expressed similar concerns about the potential for discriminatory practices in the context of payphone services.[123] Indeed, as we explained above, Congress expressly directed the Commission to prevent the BOCs from discriminating against competing PSPs in the provision of payphone services. For these reasons, we believe that it is appropriate for states to adopt the same method for calculating a ceiling for overhead allocation as we did in the *Physical Collocation Tariff Order*, recognizing that states that continue to use UNE overhead allocations for payphone services are also in full compliance with section 276 and our precedent. Moreover, it is also consistent with our past application of the price cap new services test, and permissible

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[119] *Id.* at 18858-59, para. 313.

[120] *Id.*

[121] *Id.* paras. 313-14.

[122] *Id.* at 18855, para. 307.

[123] *First Payphone Order*, 11 FCC Rcd at 20614, para. 146, and 20640, para. 199; *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

in this context, for states to determine overhead assignments using the methodology that the Commission used to evaluate the reasonableness of ONA tariffs in the *ONA Tariff Order.*[124] In that investigation, the Commission used ARMIS data to calculate an upper limit for both the ratio of direct cost to direct investment and the ratio of overhead cost to total cost. Analogously, states could use ARMIS data relating to the plant categories used to provide payphone services in calculating an upper limit on overhead loadings.

55. The LEC Coalition claims that BOCs are free to apply to payphone line service rates whatever markup over direct cost is incorporated in their business line rates, even though business line rates may include subsidies for other BOC services.[125] The Coalition asserts that BOCs have virtually unlimited flexibility in determining the overhead component of payphone line service rates because "the amount of overhead costs that are recovered in the rate does not affect whether the rate is based on costs."[126] The LEC Coalition argues that any overhead loading a BOC might choose is "reasonable" for purposes of the new services test so long as it is justified by "some plausible benchmark."[127]

56. We reject the LEC Coalition's argument. As noted above, under the new services test and our precedent, BOCs bear the burden of affirmatively justifying their overhead

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[124] *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440, 458-59, para. 50, and 477-80, Attach. C (Dec. 15, 1993) (*ONA Tariff Order*).

[125] LEC Reply at 9.

[126] *Id.* at 10.

[127] *Id.* at 7.

allocations. In general, in our decisions applying the new services test to services offered to competitors, we have allowed BOCs some flexibility in calculating overhead allocations, but we have carefully reviewed the reasonableness of BOCs' overhead allocations. We have *not* simply accepted any "plausible benchmark" proffered by an BOC.[128]

57. We also reject the Coalition's argument that the Commission's *Payphone Features Order*[129] supports the proposition that any overhead allocation within a wide range is "reasonable" for purposes of t he new services test. In fact, that decision shows that our evaluation of overhead allocations under the new services test has been very fact-specific. We did permit an unusually high overhead loading in that matter based on adequate justification. We stressed, however, that our decision was specific to the circumstances of the particular investigation, which involved payphone features whose monthly costs did not exceed a few cents per line. We specifically ruled that "we do not find that it will necessarily be determinative in evaluating overhead loadings for other services."[130]

58. In sum, we establish a flexible approach to calculating BOCs' overhead allocation for intrastate payphone line rates. States may continue to use UNE loading factors to evaluate BOCs' overhead allocation for payphone services, but we do not require that UNE overhead allocations must serve as a ceiling on payphone service overhead loading. To evaluate such a ceiling, states should use the methodology from either

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[128] *See, e.g., ONA Tariff Order,* 9 FCC Rcd at 455, para. 40; *Physical Collocation Tariff Order,* 12 FCC Rcd at 18856, paras. 308-09.

[129] *Payphone Features Order,* 12 FCC Rcd 17996.

[130] *Id.* at 18003, para. 13.

the Commission's *Physical Collocation Tariff Order* or *ONA Tariff Order*. Consistent with Commission precedent, the BOCs bear the burden of justifying their overhead allocations for payphone services and demonstrating compliance with our standards.

D. ADJUSTMENT FOR FEDERALLY TARIFFED COMMON LINE CHARGES

59. The *Bureau Order* stated that "cost based" payphone line service rates calculated pursuant to the *Payphone Order* requirements must be adjusted to take account of federally tariffed charges, *i.e.*, the SLC and PICC.[131] We affirm this requirement with respect to the SLC but not with respect to the PICC.

60. Under the new services test, the BOC may not charge more for payphone line service than is necessary to recover from PSPs all monthly recurring direct and overhead costs incurred by BOCs in providing payphone lines. The forward-looking cost studies used to make these determinations are usually calculations of total costs, not jurisdictionally separated costs. If an incumbent BOC files in its state tariff a charge that fully recovers these unseparated costs and also assesses on the PSP its federally tariffed SLC, the BOC will over-recover its costs, and the PSP will over-pay, in violation of the new services test and the cost-based rates requirement of the *Payphone Orders*. The multiline business PICC, on the other hand, does not recover the costs of the lines on which it is assessed. Rather, it recovers costs that would be recovered through charges on residential and single line business lines,

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[131] *See supra* note 63 and accompanying text

if those charges were not capped.[132] It is a temporary subsidy element that is being phased out of the interstate access charge system.[133] PICC revenues should not, therefore, be subtracted in determining a forward-looking cost-based rate for payphone lines.

61. Therefore, in establishing its cost-based, state-tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federally tariffed SLC. Verizon contends that cost-based rates need only be adjusted to account for SLC rate levels as of April 1997.[134] We disagree. At whatever point in time a state reviews a BOC's payphone line rates for compliance with the new services test, it must apply an offset for the SLC that is then in effect.

E. COST SUPPORT FOR USAGE ELEMENTS

62. The *Bureau Order* stated that the new services test applies to usage sensitive as well as flat-rate elements of the services offered to PSPs. We affirm.

63. The LEC Coalition argues that, in the *Payphone Orders*, we only required the new services test to be applied to the

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[132] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Report and Order, 15 FCC Rcd 12962, 13004, para. 106 (May 31, 2000). We note that parties have filed a reconsideration petition seeking relief from application of the multiline business PICC to payphone lines. This petition is currently pending.

[133] *Id.*

[134] Response of Verizon North at 6-7 (filed Oct. 23, 2000) (Verizon Response).

monthly rate for the payphone line.[135] Two years ago, however, the Bureau clarified that the new services test applies to all payphone line service rates, including per-call or per-minute rates applicable to local usage.[136] Nevertheless, the Coalition contends that we did not require application of the test to local usage rates that are uniformly applicable to PSPs and business line subscribers. According to the LEC Coalition, rates that are equal to business usage rates are not "payphone-specific" and were not intended to be covered by the new services test.[137]

64. We reject the LEC Coalition's interpretation of the Commission's orders. In the *Payphone Orders*, we required LECs to provide PSPs with local exchange services that would enable payphone service providers to offer payphone service using either "smart" or "dumb" payphones.[138] Providing only a line, without allowing local calls over the line, does not satisfy this requirement.[139] We required these payphone line

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[135] LEC App. at 16 n.14; Verizon Response at 12-14.

[136] Letter from Yog R. Varma, Deputy Chief, Common Carrier Bureau, to Caroline Vachier, Deputy Attorney General of New Jersey, 14 FCC Rcd 17091, 17092 (Oct. 5, 1999).

[137] LEC App. at 16 n.14.

[138] *Payphone Reconsideration Order*, 11 FCC Rcd at 21307-08, para. 162.

[139] The LEC Coalition cites a prior Bureau order discussing "payphone specific" services in support of its position that a BOC may exempt local usage from *Payphone Orders* requirements by not including local usage rates in a "payphone specific" tariff or by not offering local usage at a "payphone specific" rate. LEC App. at 16 n.14. The Bureau used the term "payphone specific" to distinguish those network "features and functions" that must be *federally tariffed* from those that may be offered solely under *state tariffs*. Nothing in the Bureau's orders supports the proposition that a BOC could avoid subjecting necessary network services, such as local usage, to any of

services to be priced at cost-based rates in accordance with the new services test.[140] Therefore, any rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost-based and priced in accordance with the new services test. This requirement applies regardless of whether current payphone line service tariffs specify a particular rate for payphone line usage, or whether they currently incorporate by reference the applicable rate from a business service tariff.

65. This conclusion advances our purpose in requiring cost-based payphone line rates in the first place. A high usage rate would undermine our and the states' efforts to set the payphone service rates in accordance with a cost-based standard. A non-co st-based usage rate would also constitute an impermissible "end run" around the requirements of section 276.

F. WISCONSIN PAYPHONE RATES

66. We do not now review or evaluate the cost support materials submitted by Ameritech and Verizon. We urge the Wisconsin Commission to review its jurisidiction to apply the new services test in light of the fact that, as we have described above, it is intended to address potentially discriminatory practices in accordance with the requirements of section 276 and would seem to be within the Wisconsin Commission's authority to prevent such discrimination.[141]

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the *Payphone Orders'* tariffing requirements, under *either* federal *or* state tariffs, by the simple device of tariffing those services in a "non-payphone-specific" manner.

[140] *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163 & n.492.

[141] *See supra* note 45 and accompanying text.

67. We also relieve TDS and Century, and by extension other small rural incumbent LECs, of the obligation to comply with the application of the new services test as set forth herein. Neither TDS nor Century are BOCs, and, as we have discussed above, our federal jurisdiction to apply the new services test was intended to reach BOCs only.[142] Nevertheless, nothing prevents states from applying the new services test to all non-BOC LECs, whether rural or not, but we conclude that the states themselves should determine whether that is appropriate and warranted.[143]

IV. CONCLUSION

68. In sum, we issue this *Order* to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*. This *Order* includes the following basic propositions: First, BOCs' intrastate payphone line rates, including usage rates, should comply with the flexible, cost-based new services test. Second, these rates should be calculated using a forward-looking, direct cost methodology such as TELRIC or TSLRIC, but the full pricing regime of sections 251 and 252 does not apply. Third, overhead loading rates for payphone line rates should be cost-based, and such rates may be calculated using UNE overhead loading factors, provided that such rates do not exceed an upper limit calculated using the methodology from either the *Physical Collocation Tariff Order* or the *ONA Tariff Order*. Finally, BOCs' payphone line rates should be adjusted to account for SLC charges, as set forth herein.

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[142] *See supra* para. 42.

[143] *See also id.*

V. ORDERING CLAUSES

69. Accordingly, pursuant to sections 4(i), 205, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 205, and 276, IT IS HEREBY ORDERED that the Application for Review of the LEC Coalition is hereby GRANTED and that the LEC Coalition's request that we withdraw or stay the *Bureau Order* is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

United States Court Of Appeals
For The District Of Columbia Circuit

No. 02-1055 **September Term, 2003**

Filed on: SEP 22 2003

New England Public Communications Council, Inc.,
Petitioner

v.

Federal Communications Commission and United States of America,
Respondents

American Public Communications Council, et al.,
Intervenors

Consolidated with 02-191, 02-1092, 02-1105

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

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* Circuit Judge Henderson did not participate in this matter.

ORDER

Upon consideration of petitioners' petition for rehearing en banc in No. 02-1055 and No. 02-1105, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Relevant Statutory Provisions

Pertinent provisions of the United States Code are as follows:

47 U.S.C. § 152. Application of chapter.

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction. Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under

direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 201. Service and charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day,

night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202. Discriminations and preferences.

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included. Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of

communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty. Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 205. Commission authorized to prescribe just and reasonable charges; penalties for violations.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United

States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 276. Provision of payphone service

(a) Nondiscrimination safeguards. After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service:

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations.

(1) Contents of regulations. In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that:

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access

revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry- III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones. In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts. Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA

carriers that are in force and effect as of February 8, 1996.

(c) State preemption. To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) Payphone service defined. As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.